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# In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF SOUTH DAKOTA; WILLIAM J. JANKLOW, as Governor; JOYCE HAZELTINE, as Secretary of State; and MARK BARNETT, as Attorney General,

*Petitioners*

v.

SDDS, INC.,

*Respondent.*

**Petition for a Writ of Certiorari to the Supreme Court of South Dakota**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In this case, a federal court issued an injunction that orders the State of South Dakota and various state officials not to defend the State against certain claims in a takings action for money damages brought against South Dakota in state court. The South Dakota Supreme Court then held that it was bound by that federal decision and accordingly ruled against the State in the takings action. The questions presented are:

1. Whether the federal court's judgment is void because the Eleventh Amendment deprives a federal court of jurisdiction to entertain a suit against a State and state officials that seeks to prevent the State from defending itself against a claim for money damages that is pending in state court.

2. Whether a federal-court judgment may bind a state court in a subsequent action for retroactive monetary relief against the State: (a) in any circumstances; or (b) when the federal court lacked jurisdiction under the Eleventh Amendment to enter its judgment.

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## PETITION FOR A WRIT OF CERTIORARI

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### OPINIONS BELOW

The opinion of the Supreme Court of South Dakota (App., *infra*, 1a-13a) is reported at 569 N.W.2d 289 (1997). The opinion of the South Dakota Circuit Court (App., *infra*, 14a-37a) is unreported.

### JURISDICTION

The judgment of the Supreme Court of South Dakota was entered on September 17, 1997, and a timely petition for rehearing was denied on October 24, 1997. App., *infra*, 74a. On January 6, 1998, Justice Thomas extended the time for filing the petition for a writ of certiorari to and including February 21, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

### CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

### STATEMENT

The decision of the South Dakota Supreme Court in this case imposes significant and wholly unwarranted limits on state sovereignty. In related proceedings, a federal court enjoined the State of South Dakota not to defend itself against certain claims in a suit for money damages brought against it in its own courts — a holding that plainly is insupportable under the Eleventh Amendment. In this case, the South Dakota Supreme Court then held that it was bound by the federal-court injunction to rule against the State, even though the state court declared that it otherwise would have been inclined to reject the plaintiff's claims for monetary relief. The South Dakota court's holding offers a model for future attempts to evade the Eleventh Amendment, departs from decisions of this Court, and sows

confusion in an already complex and difficult area of the law. Further review therefore is warranted.

1. In 1988, respondent South Dakota Disposal Systems, Inc. ("SDDS"), purchased rangeland in South Dakota and then applied to the South Dakota Board of Minerals and Environment for a permit that would authorize construction and operation of a waste disposal facility (the "Lonetree facility") on the property. While that lengthy, contentious, and ultimately unsuccessful administrative effort was underway,[1] the citizens of South Dakota enacted a ballot initiative that precluded operation of such a facility absent prior approval by the state legislature. The legislature gave the requisite approval in early 1991, but the South Dakota voters, by ballot referendum, then disapproved the legislature's authorization of respondent's facility. The referendum thus restricted the operation of a large-scale waste disposal facility on respondent's property. App., *infra*, 2a-6a, 18a.

Respondent then sought declaratory and injunctive relief in federal court against the State and various of its officers in their official capacities (collectively, the "state defendants"), arguing that the referendum violated the Commerce, Due Process, and Equal Protection Clauses of the United States Constitution.[2] The Eighth Circuit agreed with respondent's dormant Commerce Clause claim, holding that the referendum was unconstitutional

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[1] After numerous administrative proceedings and three trips to the South Dakota Supreme Court, that court held that, because of errors in the permitting process, respondent's "'permit cannot be said to have ever been valid.'" App., *infra*, 6a, quoting *Matter of 1990 Renewal Application of SDDS*, 507 N.W.2d 702, 704 (S.D. 1993).

[2] SDDS earlier had brought suit in state court, arguing that the ballot initiative was unconstitutional under the Commerce and Equal Protection Clauses of the United States Constitution. The trial court ruled against respondent; the decision was not appealed. See App., *infra*, 5a.

because it had been approved "for a discriminatory purpose" and "has a discriminatory effect against interstate commerce." *SDDS, Inc. v. South Dakota*, 47 F.3d 263, 268 (8th Cir. 1995) (*Lonetree III*)[3] (App., *infra*, 65a-66a). The court of appeals "express[ed] no view as to the merits of the due process or equal protection claims brought by [respondent]." *Id.* at 265 n.1 (App., *infra*, 59a n.1).

In addition to the federal constitutional suit, respondent commenced this action in state court against the State, arguing that the referendum worked a temporary taking of its property by preventing use of the rangeland as a waste disposal facility; respondent demanded millions of dollars in compensation. App., *infra*, 5a, 4a n.6.[4] The trial court ruled for the State. That court concluded in a comprehensive opinion that respondent had no property interest to be taken, explaining that respondent "was not entitled to site, construct or operate a waste disposal facility without a valid permit" (*id.* at 23a) and "[b]ecause [respondent's] permits were invalid and void from the beginning, the permitting process did not expand [respondent's] property rights to include a use interest to site, construct and operate a large-scale solid waste disposal facility." *Id.* at 25a-26a. The court also found that respondent failed to demonstrate that the ballot referendum was the cause of the

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[3] We cite the Eighth Circuit's decisions as *Lonetree III* and *Lonetree IV* to conform to the citation style used in the court below.

[4] Respondent alleged a temporary taking, running from July 1, 1991, the date legislative approval of the referendum would have taken effect absent the referendum, and February 6, 1995, the date on which the Eighth Circuit held the referendum unconstitutional. App., *infra*, 6a-7a. This was respondent's second takings claim. It brought its first suit early in 1991, arguing that its property was taken by the ballot initiative and seeking $100 million in damages. Respondent voluntarily dismissed that claim later in 1991. App., *infra*, 4a.

Lonetree facility's failure, noting that "even if [respondent] had unrestricted legislative approval [to operate the facility], it had no permit and therefore no right to operate while the Referendum was in effect." *Id.* at 36a. Respondent appealed that decision to the South Dakota Supreme Court.

2. Immediately after filing its appeal in the state takings action, respondent returned to federal court, seeking to enjoin the State and its officials from contesting the takings claim in state court. Respondent contended in its federal injunctive suit that the state defendants in the takings action were attempting to relitigate issues that had been determined against them in the prior federal-court Commerce Clause litigation. While the district court refused to provide injunctive relief, the Eighth Circuit reversed. *In re SDDS, Inc.*, 97 F.3d 1030 (8th Cir. 1996) (App., *infra*, 38a-57a) ("*Lonetree IV*").

The court of appeals began by holding that the Eleventh Amendment did not deprive it of jurisdiction to entertain the injunctive action. The court reasoned that because the since-decided *Lonetree III* case had been a "suit for prospective declaratory relief from South Dakota's ongoing violation of the dormant commerce clause, the [state] Defendants [in that proceeding] could not have enjoyed immunity under the Eleventh Amendment." 97 F.3d at 1035 (App., *infra*, 45a). From that starting point, the Eighth Circuit concluded that it had jurisdiction to entertain the injunctive suit in *Lonetree IV*, even though the State was named as a party, because that action sought "only to effectuate our earlier judgment" in *Lonetree III*. *Ibid.* The court of appeals distinguished this Court's decision in *Green* v. *Mansour*, 474 U.S. 64 (1985), on the ground that the *Lonetree IV* injunctive suit "has been brought to effectuate our judgment in [*Lonetree III*], a '[r]emed[y] designed to end a continuing violation of federal law [which was] necessary to vindicate the federal interest in assuring the supremacy of that law.'" *Lonetree IV*, 97 F.3d at 1036 n.7 (App., *infra*, 47a n.7), quoting *Green*, 474 U.S. at 68 (bracketed material added by the court of appeals). The court of appeals reached this conclusion

even though there no longer *was* any continuing violation of federal law because the referendum already had been declared unconstitutional and respondent had abandoned its plans to construct a waste disposal facility; respondent's sole purpose in seeking the *Lonetree IV* injunction was to affect litigation against the State seeking *retroactive* money damages for a *past* (and already terminated) temporary taking.

The Eighth Circuit, relying on two rather opaque footnotes in its prior Commerce Clause opinion, went on to determine that *Lonetree III* had in fact resolved two of the principal issues in the pending state takings suit — whether respondent had a property interest in operating the Lonetree facility and whether the referendum was the proximate cause of respondent's dissolution. 97 F.3d at 1037-1040 (App., *infra*, 49a-53a). In these circumstances, the court of appeals held that it was permitted to enjoin the state takings proceedings by the "relitigation exception" to the Anti-Injunction Act. *Id.* at 1036-1037, 1040 (App., *infra*, 47a-49a, 54a).[5] While the court

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[5] While the validity of this holding is not at issue here, it should be noted that the Eighth Circuit's decision to apply the relitigation exception was plainly wrong. In ruling that respondent had a property interest in a permit to operate the Lonetree facility, the *Lonetree IV* court relied exclusively on its factual observation in *Lonetree III* that the South Dakota Board of Minerals and the Environment had concluded that all requirements for the permit had been met. *Lonetree IV*, 97 F.3d at 1038-1039 (App., *infra*, 51a-52a), citing *Lonetree III*, 47 F.3d at 265 n.5. That observation, however, did not take account of the South Dakota's Supreme Court's holding that respondent's permit was void *ab initio*, and did not say anything at all about whether respondent had a property interest under state law (or within the meaning of the Takings Clause). Similarly, in holding that *Lonetree III* had resolved the question whether the referendum was the proximate cause of respondent's dissolution, the *Lonetree IV* court relied exclusively on the earlier decision's observation that "'the referendum at the very least made the Lonetree project more difficult and expensive to

recognized that "issuing the injunction in this case will foreclose the opportunity for the [State] to relitigate issues in the state court," it did "not believe that this is a legitimate harm which must be balanced." *Id.* at 1041 (App. *infra*, 56a-57a). The Eighth Circuit accordingly directed the district court to enjoin "the Defendants from relitigating in the South Dakota state courts the issues of (1) whether [respondent] had a legitimate claim of entitlement to a permit to operate a [waste disposal facility], and (2) whether the referendum was the proximate cause of [respondent's] dissolution." *Id.* at 1042 (App., *infra*, 57a).

3. Acting under the constraint of this injunction — and in response to pressure from respondent, which threatened to seek contempt sanctions against the state defendants if they did not abandon defense of the State's position in the takings appeal — South Dakota did not file a supplemental brief in the South Dakota Supreme Court, which removed the takings case from its oral argument schedule. That court proceeded to rule for respondent. After a lengthy discussion of the takings issue, the state court strongly suggested that, like the trial court, it would have found for the State were it free to "reach the merits" of the takings claim. App., *infra*, 8a-11a n.9. But the South Dakota Supreme Court held that it was constrained to rule for

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accomplish.'" 97 F.3d at 1039 (App., *infra*, 53a), quoting *Lonetree III*, 47 F.3d at 270 n.10. It is an obvious stretch from that comment to the conclusion that the referendum terminated respondent's existence. Against this background, the Eighth Circuit's invocation of the Anti-Injunction Act's relitigation exception cannot be squared with this Court's teaching that a court applying the exception must "assess[] the precise state of the record and what the earlier federal order *actually* said"; the exception does "not permit the [court] to render a *post hoc* judgment as to what the order was *intended* to say." *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 148 (1988) (emphasis in original).

respondent because the Eighth Circuit's decision "pointedly curtails our examination of the subject." *Id.* at 7a.

The court advanced two propositions in support of this holding. First, it concluded that it was obligated to rule for respondent "by principles of comity, *res judicata*, and collateral estoppel." App., *infra*, 8a. Pointing to the "dictates of *Lonetree IV*" (*ibid.*), the court found it dispositive under those doctrines that "[t]he Eighth Circuit has held [that] the issues of proximate cause and entitlement to a permit were conclusively determined in [*Lonetree III*]; the State is the same party against whom the prior adjudication was rendered; and the State had a full and fair opportunity to defend its claim at that point." *Id.* at 11a. In reaching this conclusion, the South Dakota court expressly noted that, in its view, "[t]he federal courts certainly had jurisdiction over this federal constitutional matter." *Id.* at 12a. In addition, the South Dakota court found that it was "bound" by the Eighth Circuit's injunction not to reach the issues that were addressed in *Lonetree IV* — whether respondent had a "property right that could be threatened by an unconstitutional taking," and "'whether the referendum was the proximate cause of [respondent's] dissolution.'" App., *infra*, 8a; *id.* at 7a, quoting *Lonetree IV*, 97 F.3d at 1040. The court therefore held that it was "bound by the recent judgment of the Eighth Circuit" to decide the case in respondent's favor. App., *infra.*, 12a.

## REASONS FOR GRANTING THE PETITION

The course of this litigation, culminating in the decision of the South Dakota Supreme Court, represents an extraordinary departure from fundamental principles of federalism and state sovereignty. The Eighth Circuit's injunction was issued for the express purpose of precluding the State from defending itself against claims for retroactive monetary relief brought against it in the State's own courts; in issuing its injunction, the Eighth Circuit effectively set aside the decision of the *state* trial court, which had rejected identical claims. The South Dakota

Supreme Court — which did not receive an adversary presentation on the significance of the Eighth Circuit's ruling because the State's attorneys were precluded by the injunction from appearing to address the point — then gave force to the Eighth Circuit's decision, holding itself constrained by the federal decision to rule against the State, even though the state court disagreed with the federal court on the merits of respondent's claims.

This holding is insupportable on several levels. The South Dakota Supreme Court's conclusion that the Eighth Circuit had jurisdiction to decide what amounted to a claim for money damages against the State is flatly inconsistent with the Eleventh Amendment. And the state court's holding that it was bound by the decision of the Eighth Circuit cannot be reconciled with this Court's precedents, which establish that a decision that is invalid because issued in violation of the defendant's sovereign immunity must be denied collateral estoppel and res judicata effect. In these circumstances, the decision below disregards "the dignity and respect afforded a State, which the [Eleventh Amendment] immunity is designed to protect" (*Idaho* v. *Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 , 2033 (1997)); threatens to create considerable confusion about the nature of the Eleventh Amendment, while unbalancing the delicate relationship between the state and federal courts; and provides a road map for converting any suit under *Ex parte Young*, 209 U.S. 123 (1908), into an "'end run'" around the Eleventh Amendment. *Green* v. *Mansour*, 474 U.S. 64, 73 (1985). Further review of the decision below therefore is imperative.

The argument that follows addresses two principal issues. We begin by explaining that, because the Eighth Circuit lacked jurisdiction in *Lonetree IV*, the South Dakota Supreme Court relied upon a decision that was void. With that established, we show that the court below departed from the decisions of this

Court — and committed a serious error of *federal* law — in holding itself bound by the Eighth Circuit's decision.[6]

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[6] We note that, although the South Dakota Supreme Court remanded the case for a "determination of what, if any, damages [respondent] suffered at the hands of the State" (App., *infra*, 13a), the judgment below is final for purposes of 28 U.S.C. § 1257. Because in this case "the federal issue has been finally decided in the state courts," "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and "a refusal immediately to review the state-court decision might seriously erode federal policy," the proceeding falls within the fourth category of judgments identified as final in *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975). Failure to review the decision below will frustrate the fundamental, constitutional policy of respect for state sovereignty by subjecting the State to judicial proceedings that would not have occurred but for the action of the federal court. And if the State were to prevail on remand on grounds unrelated to those presented here (for example, through a finding that respondent suffered no damages), "the unreviewed decision of the [South Dakota] Supreme Court might seriously erode federal policy" by setting out legal rules that both generate tension between state and federal courts and authorize incursions on state sovereignty. *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 179 (1988). See also, *e.g.*, *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 55-56 (1989); R. Stern, E. Gressman. S. Shapiro, & K. Geller, SUPREME COURT PRACTICE 103 (7th ed. 1993). Moreover, this case stands on a unique footing because the federal injunction — which remains in full effect — will altogether prevent the State from litigating the federal issues presented here in the future. The procedural setting in this action therefore is decisively different from that in *Jefferson* v. *City of Tarrant*, 118 S. Ct. 481 (1997), a case that "fit[] within no exceptional category" and "present[ed] the typical situation in which the state courts have resolved some but not all of the petitioners' claims." *Id.* at 487.

### A. The Eleventh Amendment Bars A Federal Court From Entertaining A Suit Against A State Or State Officials That Is Intended To Lead To The Imposition Of Retroactive Money Damages On The State

At the outset, we think it beyond dispute that the Eleventh Amendment deprived the Eighth Circuit of jurisdiction to entertain the action in *Lonetree IV*. That suit was brought against "the State of South Dakota and various state officials in their official capacities." *Lonetree IV*, 97 F.3d at 1032 (App., *infra*, 38a). It is a matter of black letter law, however, that an unconsenting State *never* may be named as a defendant in federal court. State officials, meanwhile, may not be sued in federal court when the action is commenced for the purpose of obtaining money damages from the State — and that purpose was respondent's *sole* reason for bringing the *Lonetree IV* litigation.

#### 1. *A State Cannot Be Named As A Defendant In Federal Court*

The Eighth Circuit believed that the State of South Dakota *itself* was subject to suit in *Lonetree IV* because the plaintiff in that action was seeking "prospective injunctive relief." *Lonetree IV*, 97 F.3d at 1035 (App., *infra*, 45a). See *id.* at 1036 (App., *infra*, 46a-47a) ("the Eleventh Amendment does not bar a suit in the federal court for injunctive relief to prohibit a state defendant from relitigating in a state court issues previously decided in federal court") (footnote omitted). But that conclusion was plainly wrong.

As this Court has held repeatedly, "when the State itself is named as the defendant, a suit * * * is barred regardless of whether it seeks damages or injunctive relief." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 101-102 (1984). See *id.* at 100. There is not — and never has been — any ambiguity on this score: the Court has "often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment.

* * * The Eleventh Amendment does not exist solely in order to 'preven[t] federal court judgments that must be paid out of a State's treasury,' * * *; it also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1124 (1996) (quoting *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994), and *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). See, *e.g.*, *Coeur d'Alene Tribe of Idaho*, 117 S. Ct. at 2043-2044 (opinion of O'Connor, J.); *Cory* v. *White*, 457 U.S. 85, 90-91 (1982); *Alabama* v. *Pugh*, 438 U.S. 781 (1978). Indeed, the theory of *Ex parte Young* — upon which the Eighth Circuit purported to rely — is that "a suit challenging the constitutionality of a state official's action * * * is *not* one against the State." *Green*, 474 U.S. at 68 (emphasis added). That decision accordingly cannot justify *naming* the State as a defendant in federal court, and the Eighth Circuit thus surely erred in holding that *Ex parte Young* authorized its assertion of jurisdiction over South Dakota.

**2. A Federal Court May Not Enjoin State Officials When There Is No Ongoing Violation Of Federal Law**

a. The Eighth Circuit also was manifestly wrong when it found that the Eleventh Amendment did not deny it jurisdiction to decide the *Lonetree IV* suit against state officials. *Ex parte Young*, of course, held that state officials "who threaten and are about to commence proceedings * * * to enforce against parties affected an unconstitutional [state law], violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action." 209 U.S. at 155-156. But the *Ex parte Young* doctrine by its terms applies only "where a plaintiff alleges an *ongoing* violation of *federal* law, and the relief sought is *prospective* rather than *retrospective*." *Coeur d'Alene Tribe of Idaho*, 117 S. Ct. at 2046 (opinion of O'Connor, J.) (emphasis in original). See *Seminole Tribe of Florida*, 116 S. Ct. at 1132. Indeed, the Court made clear in *Ex parte Young*

itself that federal jurisdiction does *not* attach when the plaintiff is "merely making [a state official] a party as a representative of the State, and thereby attempting to make the state a party." 209 U.S. at 157. It accordingly has long been settled that "'a suit nominally against individuals, but restraining or otherwise affecting their action as state officers, may be in substance, a suit against the state, which the Constitution forbids.'" *Cory*, 457 U.S. at 89, quoting *Worcester County Trust Co.* v. *Riley*, 302 U.S. 292, 296 (1937).

In particular,

> [r]elief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant. This is true * * * if the relief is tantamount to an award of damages for a past violation of federal law, even though styled as something else.

*Papasan* v. *Allain*, 478 U.S. 265, 278 (1986) (footnote omitted). As the Court has explained, federal-court "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. * * * But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Green*, 474 U.S. at 68. See, *e.g.*, *Coeur d'Alene Tribe of Idaho*, 117 S. Ct. at 2034; *id.* at 2038 (opinion of Kennedy, J.); *Edelman* v. *Jordan*, 415 U.S. 651, 666, 673 (1974).

The application of this principle is illustrated by *Green* v. *Mansour*, where the plaintiff commenced an action in federal court seeking "a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law." 474 U.S. at 67. This Court held the suit barred by the Eleventh Amendment, explaining that

> [t]here is no claimed continuing violation of federal law * * * . There is a dispute about the lawfulness of [the

> defendant official's] past actions, but the Eleventh Amendment would prohibit the award of money damages or restitution if that dispute were resolved in favor of [the plaintiff]. We think that the award of a declaratory judgment in this situation would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed. ***But the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment.*** * * * [A] declaratory judgment is not available when the result would be a partial "end run" around our decision in *Edelman* v. *Jordan* * * *.

*Id.* at 73 (emphasis added).

That conclusion should have disposed of the *Lonetree IV* litigation in the Eighth Circuit. While the federal court may have had jurisdiction to hear a suit challenging *prospective* application of the ballot referendum in *Lonetree III* (although the court did not, of course, have jurisdiction to treat the *State itself* as a party in that proceeding), by the time the *Lonetree IV* action was filed, "there [was] no continuing violation of federal law to enjoin." *Green*, 474 U.S. at 64. The referendum *already* had been held unconstitutional, the State had given up any attempt to defend the referendum's legality, and respondent had long since abandoned its plans to operate a waste disposal facility. See *Lonetree IV*, 97 F.3d at 1033 (App., *infra*, 41a). Against this background, the express (and only) goal of the *Lonetree IV* litigation was to dictate the outcome of respondent's state-court suit against the State, which seeks *retroactive* monetary compensation for the alleged temporary taking — a taking that, by respondent's admission, *ended* in 1995 with the holding in *Lonetree III* that the referendum is unconstitutional.

That is why the court below characterized the Eighth Circuit's holding as a "liability determination." App., *infra*, 2a.

In these circumstances, it must be conceded that "the entire point of the [*Lonetree IV*] * * * proceeding" was to impose monetary liability on South Dakota (*Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 706 (1982) (opinion of White, J.)), an outcome that plainly "would affect the treasury of the State." *Ex parte Young*, 209 U.S. at 151. See *Edelman*, 415 U.S. at 664, 668. As in *Green*, the relief sought by respondent in *Lonetree IV* thus had "much the same effect as a full-fledged award of damages or restitution by the federal court." 474 U.S. at 73. Indeed, the jurisdictional defect is much clearer in this case than it was in *Green*. There, the Court's concern was that a declaratory judgment might be said to have res judicata effects in hypothetical future litigation against the State; here, the federal court sought to determine the outcome of a pending suit seeking a monetary judgment against South Dakota. As a consequence, "it simply cannot be said that the suit is not a suit against the State." *Coeur d'Alene Tribe of Idaho*, 117 S. Ct. at 2047 (opinion of O'Connor, J.).[7]

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[7] In distinguishing *Green*, the Eighth Circuit opined in *Lonetree IV* that it had jurisdiction because its ruling was intended "to effectuate our judgment in [*Lonetree III*], a '[r]emed[y] designed to end a continuing violation of federal law.'" 97 F.3d at 1036 n.7, quoting *Green*, 474 U.S. at 68 (App., *infra*, 47a). The court also believed that declining to issue an injunction would allow the State, "and all future state defendants, to effectively ignore judgments rendered in the federal courts, * * * rendering our judgments largely nugatory and advisory." *Id.* at 1035-1036 (footnote omitted) (App., *infra*, 45a). But that conclusion rested on a misunderstanding of basic Eleventh Amendment principles. The Eighth Circuit's decision in *Lonetree III* was acknowledged by the State to be fully effective and not at all "advisory"; the referendum had been held unconstitutional and was not being enforced. And whether or not the decision in *Lonetree III* should have been given collateral estoppel effect in the subsequent state-court takings litigation — a

b. It may be added that the litigation in *Lonetree IV* also was barred by the Eleventh Amendment for reasons wholly apart from its intended impact on the state treasury. As we have noted, it is a central requirement of the *Ex parte Young* doctrine that the requested federal relief be necessary "to remedy a state officer's ongoing violation of federal law." *Seminole Tribe of Florida*, 116 S. Ct. at 1131 n.16. But a State's (or state official's) assertion of a position in litigation — whatever the merits of the State's argument — surely cannot constitute an "ongoing violation" of law. Indeed, the Court recently granted certiorari in *Calderon* v. *Ashmus*, No. 97-391, to determine, in the habeas corpus setting, whether "the Eleventh Amendment bar[s] coercive suits that seek to prevent state officials from advocating their views on disputed issues of law." No. 97-391, Pet. i. The Court's answer to that question will likely confirm that the Eighth Circuit lacked jurisdiction in *Lonetree IV*.

**B. A State Court May Not Be Bound By A Federal-Court Judgment That Is Issued In Violation Of The Eleventh Amendment**

That the Eighth Circuit committed a serious jurisdictional error is not the end of the matter, of course; after all, it is the decision of the South Dakota Supreme Court, not that of the federal court, that is under review here. But the Eighth Circuit's error was expressly repeated by the state court, which held that "[t]he federal courts certainly had jurisdiction over the federal constitutional matter" in this case. App., *infra*, 12a. And that mistake by the South Dakota Supreme Court dictated the outcome below. The controlling *federal* rule denies collateral effect to a judgment that was issued against a sovereign in the absence of a waiver of sovereign immunity; the

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point discussed below — an injunction dictating the outcome of that litigation surely is "not the type of remedy designed to prevent ongoing violations of federal law." *Green*, 474 U.S. at 71.

court below went astray by endorsing the Eighth Circuit's jurisdictional error and holding itself bound by a judgment that was void as a matter of federal law. Indeed, in the circumstances of this case, federal law prevents a State from *ever* being estopped by the judgment of a federal court.

### 1. *A Judgment By A Court That Lacked Jurisdiction Under The Eleventh Amendment May Not Be Given Collateral Effect*

In ruling for respondent, the South Dakota Supreme Court relied principally on the related doctrines of collateral estoppel, res judicata, and comity. App., *infra*, 8a-12a. The holding below on those grounds, however, cannot be squared with this Court's decisions. The collateral consequences of the Eighth Circuit's decision in *Lonetree IV*, of course, must be settled by reference to a federal rule; it is settled that "[f]ederal law determines the effects under the rules of res judicata of a judgment of a federal court." RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1982). See, *e.g.*, *Hagen* v. *Utah*, 510 U.S. 399, 409-410 (1994); 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4468, at 651, 657 (1981) (citing cases).[8] And federal law provides that a judgment issued

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[8] The court below evidently believed that the South Dakota law of collateral estoppel and res judicata controlled (see App., *infra*, 11a-12a); it presumably was led into this error because the State thought itself precluded by the injunction from submitting argument on the proper application of the *Lonetree IV* decision. It is not apparent, however, that the federal and state rules differ in any material way. In particular, the South Dakota courts, like their federal counterparts, deny a judgment preclusive effect when the court issuing the judgment lacked jurisdiction. See, *e.g.*, *St. Paul Fire & Marine Ins. Co.* v. *Kaarup*, 420 N.W.2d 364, 365-366 (S.D. 1988); *Schutterle* v. *Schutterle*, 260 N.W.2d 341, 354-355 (S.D. 1977). See generally RESTATEMENT (SECOND) OF JUDGMENTS § 87, cmt. a (because federal and state rules of issue and claim preclusion are similar, it is "usually a moot question whether the effect of a

by a court that lacked jurisdiction under the Eleventh Amendment cannot be given collateral effect.[9]

a. While the judgments of a court that does not have jurisdiction generally do not give rise to collateral estoppel or res judicata in subsequent litigation (see generally *Matsushita Elec. Indus. Co.* v. *Epstein*, 116 S. Ct. 873, 883 (1996)), a court's express *determination* that it has jurisdiction — even an erroneous determination, like the Eighth Circuit's finding of jurisdiction in *Lonetree IV* — usually is itself given estoppel effect, as would the resolution of any other contested issue. See *Stoll* v. *Gottlieb*, 305 U.S. 165, 172 (1938). The Court has made clear, however, that this "general rule of finality of jurisdictional determinations is not without exception." *Durfee v. Duke*, 375 U.S. 106, 114 (1963). In particular, "[d]octrines of federal pre-emption or sovereign immunity may in some contexts be controlling," stripping a judgment of its collateral effect even when the court issuing the judgment had determined, after litigation, that it had jurisdiction to decide the case. *Ibid.*, citing *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940), and *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940).

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federal judgment is determined by federal law or state law"). It may be added that a federal question would be presented here even if state rules of issue and claim preclusion applied: under Full Faith and Credit principles, state court applications of res judicata or collateral estoppel "'become part of national jurisprudence, and therefore federal questions cognizable here.'" *Durfee* v. *Duke*, 375 U.S. 106, 109 (1963), quoting *Riley* v. *New York Trust Co.*, 315 U.S. 343, 349 (1946).

[9] It is plain that the court below regarded itself as bound by *Lonetree IV*, a suit in which the federal court plainly did not have jurisdiction, rather than by the Eighth Circuit's earlier judgment in *Lonetree III*. See App., *infra*, 8a ("we are bound by the dictates of *Lonetree IV*").

That rule, stated clearly in *United States Fidelity & Guaranty*, should have been dispositive here. In that case, a court in Missouri ruled against the United States, notwithstanding the United States' failure to waive its sovereign immunity. The United States did not seek review of that decision on appeal. The plaintiff then asserted that the Missouri judgment should be given res judicata effect in a second suit in Oklahoma. 309 U.S. at 509-511. After noting that the Missouri judgment was "void" because the sovereign immunity of the United States may be waived only by statute and not by government officials (*id.* at 512-513) — a rule that also applies to waivers of state immunity under the Eleventh Amendment[10] — the Court held:

> *[t]he reasons for the conclusion that this immunity may not be waived [through the participation of government officials in litigation against the sovereign] govern likewise the question of res judicata.* * * * Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power. Public policy forbids the suit unless consent is given.

*Id.* at 514 (emphasis added). The Court concluded by noting that the case involved "a collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit. We are of the opinion, however, that without legislative action the doctrine of immunity should prevail." *Id.* at 514-515.

This holding stands squarely for the proposition that the usual res judicata and collateral estoppel rule — which bars collateral attack on a court's determination of its jurisdiction —

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[10] See, *e.g.*, *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985); *Edelman*, 415 U.S. at 673; *Ford Motor Co.* v. *Dept. of Treasury*, 323 U.S. 459 (1945).

"is not applicable in actions against a sovereign where the officials who represent the sovereign in the action are not empowered to waive the immunity of the sovereign or to bind the sovereign by litigating the question of its immunity." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 96, cmt. a (1971), citing *United States Fidelity & Guaranty*. As a leading commentator accordingly has noted, "[a] judgment may be void if it * * * was issued in contravention of a * * * sovereign immunity. * * * [Such judgments] remain subject to collateral attack if recognition or enforcement is sought either in the jurisdiction where reached or in another jurisdiction." 18 MOORE'S FEDERAL PRACTICE § 130.04[3] (3d ed. 1997). See Bennett Boskey & Robert Braucher, *Jurisdiction and Collateral Attack: October Term, 1939*, 40 Colum. L. Rev. 1006, 1027 (1940) (under *United States Fidelity & Guaranty*, sovereign immunity is an exception to the usual rule of finality of jurisdictional determinations).

The Court reached a similar conclusion in *Kalb* v. *Feuerstein*, where it held that federal policies of compelling importance may strip a judgment of its collateral effect. That case involved a challenge to a state-court judgment foreclosing on a mortgage. In a second suit, the mortgagor argued that the first judgment was subject to collateral attack because federal bankruptcy law "oust[ed] the jurisdiction of the [first] State court so as to stay its power to proceed with foreclosure." 308 U.S. at 438. This Court agreed, explaining that federal law deprived the foreclosing state court of jurisdiction and rendered its orders "nullities subject to collateral attack." *Id.* at 439. The Court added that

> Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the [mortgagor]. * * * [C]onsiderations as to whether the issue of jurisdiction was actually contested in the [state] [c]ourt, or whether it could have been contested, are not applicable where the plenary power of Congress * * * has been exercised as in this Act.

*Id.* at 444 (footnotes omitted). Under this principle, while a court's determination of its subject matter jurisdiction ordinarily is not subject to collateral challenge, the principle of *Kalb* "will prevent application by a State of such a rule of res judicata when to do so would conflict with an important federal policy." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 97, cmt. c, citing *Kalb*. See *Matsushita*, 116 S. Ct. at 884 n.8; *United States* v. *Williams*, 341 U.S. 58, 66-67 (1951); *Town of Springfield* v. *McCarren*, 549 F. Supp. 1134, 1147-1148, aff'd, 722 F.2d 728 (2nd Cir.), cert. denied, 464 U.S. 942 (1983). This rule has obvious application in this case, where the Eleventh Amendment states the controlling federal policy and — as a limitation on "'the entire judicial power granted by the Constitution'" (*Seminole Tribe of Florida*, 116 S. Ct. at 1129, quoting *Ex parte New York*, 256 U.S. 490, 497 (1921)) — divests a federal court of power to bind a State whether or not "the issue of jurisdiction [was] * * * contested or even raised." *Kalb*, 308 U.S. at 444.[11]

b. The collateral estoppel holding below also is inconsistent with this Court's decisions for a second and related reason. The South Dakota court concluded that it was bound by the Eighth Circuit's decision because "the State is the same party against whom the prior adjudication [in *Lonetree IV*] was rendered." App., *infra*, 11a. But that holding cannot be squared with federal law. It is true that state officials appeared

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[11] In *Durfee*, the Court suggested in passing that the jurisdictional issues had not actually been litigated in the first forum in *United States Fidelity & Guaranty* and *Kalb*. 375 U.S. at 114 n.12. That statement may not have been accurate as to *United States Fidelity & Guaranty*, however; the lower court in the Oklahoma proceeding in that case assumed that the issue *had* been raised in the first forum (see 24 F. Supp. 961, 964 (E.D. Okla. 1938)) and this Court said nothing to the contrary. As for *Kalb*, the Court there declared that whether the question of jurisdiction was or could have been litigated in the first forum was immaterial. 308 U.S. at 444.

in federal court to litigate *Lonetree IV*. But even assuming (as the Eighth Circuit believed) that those individuals were subject to suit in federal court under *Ex parte Young*, the theory of that case is premised on the understanding that "a suit challenging the constitutionality of a state official's action in enforcing state law is *not* one against the State." *Green*, 474 U.S. at 68 (emphasis added). See *Coeur d'Alene Tribe of Idaho*, 117 S. Ct. at 2047 (opinion of O'Connor, J.) ("The *Young* doctrine rests on the premise that a suit against a state official to enjoin an ongoing violation of federal law is not a suit against the State."); *Ex parte Young*, 209 U.S. at 159-160 (suit "does not affect[ ] the state in its sovereign or governmental capacity"; official subject to suit in federal court is "stripped of his official or representative character").

As a consequence, the involvement of state officials in the *Lonetree IV* litigation did not permit the South Dakota court to treat the federal action as one against the State; indeed, in the absence of statutory authorization, state officials could not have made the State a party to the *Lonetree IV* litigation even had they wanted to. See *Ford Motor Co.*, 323 U.S. at 168; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 97, cmt. a. The State therefore never appeared in federal court and, necessarily, could not be bound by the Eighth Circuit's judgment.

Nor does it matter that the Eighth Circuit expressly treated the State as a party in *Lonetree IV*; as we have explained, an unconsenting State cannot be deemed a party in federal court. Indeed, for reasons noted by the Court in *United States Fidelity & Guaranty*, "[c]onsent alone gives jurisdiction to adjudge against a sovereign." 309 U.S. at 514. Yet if preclusive effect is given to a federal judgment in a subsequent suit for money damages against a State, the State will be held liable as a consequence of federal proceedings to which it never gave its consent. Such an outcome would allow a plaintiff to bootstrap a void federal judgment — or, for that matter, a judgment validly obtained under the doctrine of *Ex parte Young* — into an award of money damages against the State. Given the

constitutional rule that bars subjecting nonconsenting States to the judgments of federal courts, this is a result that "[p]ublic policy forbids." *Id.* at 514.[12]

The problem presented in this case is a potentially recurring one of considerable doctrinal and practical importance. The decision below, which gives preclusive effect to a federal judgment against an unconsenting State, detracts significantly from "[the Court's] understanding of the Eleventh Amendment as reflecting a broader principle of sovereign immunity," (*Coeur d'Alene Tribe of Idaho*, 117 S. Ct. at 2033); it also undermines "[t]he dignity and status of [South Dakota's] statehood," which "allows [the State] to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts." *Id.* at 2043. In doing so, the South Dakota Supreme Court's decision offers plaintiffs a formula for converting *Ex parte Young* suits into money judgments against States. This holding creates uncertainty in an area of considerable importance to States and private litigants alike, is sure to prompt increased litigation, and departs from principles announced by this Court. Further review therefore is in order.

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[12] In addition to principles of res judicata and collateral estoppel, the South Dakota court cited considerations of comity in support of its holding. App., *infra*, 12a. But that doctrine does not provide independent justification for the judgment below. The South Dakota court itself recognized that comity does not dictate adherence to the decision of another court unless "'[t]he foreign court actually had jurisdiction over both the subject matter and the parties.'" *Ibid.* (citation omitted). The absence of jurisdiction in the Eighth Circuit therefore precluded deference to its decision as a matter of comity.

### 2. *The South Dakota Supreme Court Was Not Bound By The Eighth Circuit's Injunction*

a. While the South Dakota Supreme Court relied principally on collateral estoppel and res judicata principles in ruling for respondent, the court below also found that the Eighth Circuit's anti-suit injunction was dispositive. Thus, while the state court noted that the injunctive order "bars the State" from making certain arguments (App., *infra*, 7a), the court believed *itself*, as well as the State, to be constrained by the injunction. The court thus indicated that the injunction "pointedly curtails our examination of the subject" (*ibid.*), and declared that it was "bound" by *Lonetree IV* "by reason of the [relitigation] exception to the Anti-Injunction Act." *Id.* at 8a. The court accordingly appeared to be of the view that, even apart from principles of issue and claim preclusion, the *Lonetree IV* injunction ordered it to decide the case in respondent's favor. This reading of the injunction, however, involved a serious and potentially recurring error of federal law that should be corrected by this Court.

On the face of it, the injunction formulated by the Eighth Circuit was directed only at the defendants in *Lonetree IV* — the State and named state officials — and required only that *those defendants* not litigate certain issues in the pending state proceedings. 97 F.3d at 1041-1042 (App., *infra*, 57a). See *id.* at 1032 (App., *infra*, 38a-39a) (noting that court was deciding appeal from district court's denial of a motion "to enjoin the State of South Dakota and various state officials in their official capacities * * * from relitigating in the South Dakota state courts certain issues"). For that reason, the state officials who were *parties* in the *Lonetree IV* litigation may have bound by the injunction; the Eighth Circuit's judgment against them may be enforceable in state courts under Full Faith and Credit

principles,[13] and contempt and other enforcement remedies would have been available had the state officials disregarded the Eighth Circuit's order (by, for example, attempting to litigate issues declared off-limits by the federal court). In contrast, however, the injunction did not impose any obligation on the state *courts*. The court below therefore should not have regarded itself as bound by the injunction to decide the takings case in a particular way.[14]

This Court made that distinction clear in *Ex parte Young* itself, explaining that

> the right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it * * * . [A]n injunction against a state court would be a violation of the whole scheme of our government. *If an injunction against an individual is disobeyed, and he commences proceedings * * * in a court, such disobedience is personal only, and*

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[13] The Court has indicated that the judgments of federal courts are covered by the Full Faith and Credit statute, 28 U.S.C. § 1738. See, *e.g.*, *Durfee*, 375 U.S. at 112 n.10.

[14] Of course, an injunction against the parties often has the practical effect of terminating the litigation. That is true, for example, where an injunction precludes a party to litigation from initiating suit, or filing a dispositive motion, or taking an appeal; in such circumstances, the court in which the litigation is pending will effectively be precluded from deciding the case. But that was not true here. In this case, at the time that the Eighth Circuit issued its injunction the appeal had been filed, the parties had submitted their briefs on the merits of the takings issues, and the matter was pending in the South Dakota Supreme Court. In this setting, there should have been nothing to prevent the state court from deciding the case as it saw fit.

> *the court * * * can proceed without incurring any penalty on that account.*

209 U.S. at 163 (emphasis added). The Court added that "[t]he difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction is plain, and no power to do the latter exists because of a power to do the former." *Ibid.*

The understanding that anti-suit injunctions like the one in this case should not be read to bind courts also is mandated by the principles of federalism that underlie the Anti-Injunction Act. After all, under the Act "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U.S. 281, 297 (1970). See *Chick Kam Choo*, 486 U.S. at 146, 148. Cf. *Ex parte Fahey*, 332 U.S. 258, 260 (1947) (Court hesitates to issue writs of prohibition, which are "drastic and extraordinary remedies * * * [with] the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or leave his defense to one of the litigants before him"). That same imperative, intended to minimize tensions between state and federal courts, counsels in favor of reading an injunction such as the one at issue here to run against the parties and not against the state court. Any other understanding would detract significantly from the "fundamental constitutional independence of the States." *Chick Kam Choo*, 486 U.S. at 146.

The South Dakota court's error is more than an isolated mistake; it has importance that transcends its impact in this case. Anti-suit injunctions typically take the form of the one imposed by the Eighth Circuit here, running against the parties rather than the court. See, *e.g.*, *Chick Kam Choo*, 486 U.S. at 144; *Atlantic Coast Line*, 398 U.S. at 283; *Hawaii Housing Auth. v. Midkiff*, 463 U.S. 1323, 1324 (1983). The decision

below that such injunctions necessarily bind the court in the forum state — even when, as in this case, the court issuing the injunction both lacked jurisdiction and premised the injunction on a misunderstanding of the law of the forum state[15] — will sow confusion and exacerbate "'the inevitable friction between state and federal courts that ensues from the injunction of state judicial proceedings by a federal court.'" *Chick Kam Choo*, 486 U.S. at 146, quoting *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 630-631 (1977) (plurality opinion). The proper reading of such injunctions, which involves an important issue that arises with some frequency, should be settled by this Court.

b. In addition, the decision below is incorrect for an independent reason: the South Dakota court would not have been bound even if it *were* the target of the federal-court injunction. It is true that, ordinarily, an injunction that is issued in error restrains the parties until it is modified or set aside, and that is so even if the court issuing the injunction lacked jurisdiction to do so. See generally *United States* v. *United Mine Workers of Am.*, 330 U.S. 258 (1947); *Walker* v. *City of Birmingham*, 388 U.S. 307, 320-321 (1967). As we have indicated, the injunction in this case therefore may well have been enforceable against the state officials who were defendants in *Lonetree IV*. An injunction against the court itself, however, is quite another matter. For one thing, it is doubtful that federal judges have the authority to enjoin a state court; as noted above, in *Ex parte Young* the Court indicated that such an injunction "would be a violation of the whole scheme of our government." 209 U.S. at 163.

Moreover, in this case the South Dakota Supreme Court was not a party to the federal proceeding and therefore had no opportunity to contest the validity of the injunction. In

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[15] The question whether respondent had an entitlement to a permit, and thus a property interest, was determined by reference to state administrative law and state court proceedings.

analogous circumstances, this Court has made clear that a non-party subject to a court order may make a collateral challenge to the jurisdiction of the court issuing the order. See *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) ("a nonparty witness may attack a civil contempt citation by asserting that the issuing court lacks jurisdiction over the cause"); *United States* v. *Ryan*, 402 U.S. 530, 532 & n.4 (1971) (noting availability of collateral attack on validity of subpoena where party had no prior opportunity to seek review of subpoena); *In re Green*, 369 U.S. 689 (1962) (permitting collateral attack on sanctioning court's jurisdiction where court had refused contemnor a hearing on the issue). Here, the forum for such a collateral attack is the South Dakota courts, and those courts should have been free to disregard an order — directed at them — that was issued by a federal court that lacked jurisdiction. As this Court has explained, such a

> challenge in this case goes to the subject-matter jurisdiction of the court and hence to its power to issue the order. * * * It rests * * * on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power.

*United States Catholic Conference*, 487 U.S. at 77.

To be sure, in the typical case — one that, unlike this proceeding, does not involve the *United States Fidelity & Guaranty* and *Kalb* exceptions to ordinary rules of issue and claim preclusion — an anti-suit injunction issued by a federal judge against either a state court or the parties to the litigation likely would be treated as enforceable as a matter of res judicata or collateral estoppel under Full Faith and Credit principles. In such a case, a state-court decision disregarding the injunction would be reviewable in this Court. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 95 & cmt. d, § 102 & cmt. c. Moreover, state courts may choose voluntarily to view

themselves as bound by anti-suit injunctions issued against the parties, even in cases where claim or issue preclusion is not controlling. See, *e.g.*, *James* v. *Grand Trunk W. R. Co.*, 152 N.E.2d 858 (Ill. 1958); *Smith* v. *Walter E. Heller & Co.*, 82 Cal. App. 3d 259 (Cal. App. 1978). Courts enforce such injunctions, however, as a matter of judicial comity. And as the court below itself recognized (App., *infra*, 12a), principles of comity come into play only when the court issuing the injunction had jurisdiction to do so. The failure of jurisdiction in the Eighth Circuit therefore made the *Lonetree IV* injunction unenforceable — and the South Dakota Supreme Court's holding that the Eighth Circuit "certainly had jurisdiction" (*ibid.*) accordingly was a dispositive error of law that should be corrected by this Court.

* * * *

In sum, the decision below places the State in an untenable position. South Dakota was forced to litigate in federal court. It was precluded by the federal-court injunction from participating meaningfully in the state-court litigation that is to determine its liability. And now, by reason of the decision below, the State faces the imposition of substantial monetary liability as a direct consequence of federal litigation to which South Dakota never could have been a party. This outcome is an intolerable affront to the "dignity and respect afforded a State." *Coeur d'Alene Tribe of Idaho*, 117 S. Ct. at 2033. This Court should intervene to settle the law and correct judicial proceedings that have gone fundamentally astray.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1998

## APPENDIX A

**SDDS, INC., a South Dakota corporation,**
**Plaintiff and Appellant,**

**v.**

**STATE of South Dakota, William J. Janklow, as Governor, Joyce Hazeltine, as Secretary of State, and Mark Barnett, as Attorney General for the State of South Dakota, Defendants and Appellees.**

**No. 19555.**

Supreme Court of South Dakota.

Considered on Briefs June 4, 1997.

Decided Sept. 17, 1997.

Rehearing Denied Oct. 24, 1997.

Developer sought damages for an alleged unconstitutional taking after a statewide referendum rejected prior legislative approval for the developer's municipal solid waste landfill facility. The Circuit Court, Sixth Judicial Circuit, Hughes County, Steven L. Zinter, J., granted the State's motion for summary judgment. Developer appealed. The Supreme Court, Konenkamp, J., held that a federal appellate court's decision that barred the State from arguing that the developer had no legitimate entitlement to a permit for construction of its facility prevented any further state court litigation on whether the developer had a property right that could have been threatened by an unconstitutional taking.

Reversed and remanded.

Sabers, J., concurred in the result.

Kimberly A. Mortenson, Ft. Pierre, Edward T. Lyons, Jr., David E. Driggers, Thomas J. Burke, Jr. of Jones & Keller, P.C., Denver, CO, for plaintiff and appellant.

Mark W. Barnett, Attorney General, Diane Best, Roxanne Giedd, Asst. Attys. General, Pierre, for defendants and appellees.

KONENKAMP, Justice.

In 1988, South Dakota Disposal Systems (SDDS) began the process of founding the Lonetree municipal solid waste landfill in southwestern South Dakota. The plan met with many roadblocks, including citizen resistance, administrative and legislative activity, and court challenges. In 1992, a statewide referendum rejected prior legislative approval for the facility, and SDDS brought a takings action against the State for alleged losses resulting from the adverse vote. The circuit court granted summary judgment for the State, and SDDS appealed to this Court. While this appeal was pending, the Eighth Circuit Court of Appeals issued an injunction barring the State from relitigating key issues in the state court forum. Does this claim preclusion and liability determination mandate we reverse the summary judgment? As we are bound by its ruling, we answer yes, and remand the action to the circuit court consistent with the Eighth Circuit's decision.

**Facts**

Nearly a decade ago, SDDS purchased 1200 acres of rangeland near Edgemont in Fall River County. It was interested in locating and operating a balefill facility (Lonetree) that would receive initially 300,000 and later over 7.75 million tons of municipal solid waste (MSW). On November 17, 1988, SDDS filed an application with the Department of Water and Natural Resources (Department)[1] for a one-year permit, pursuant to SDCL ch 34A-6, to site, construct, and operate the MSW disposal facility. On July 10, 1989, the Department published notices in four South Dakota newspapers that it intended to deny a one-year permit and listed six deficiencies in the SDDS application. The recommendation included a notice that aggrieved persons could petition the Board of Minerals and Environment (BME), a division of the Department, for a hearing within thirty days. SDDS filed a petition, and Technical Information Project (TIP), a public interest group, was allowed to intervene in the proceedings. Before the hearing, SDDS sought to cure the six deficiencies in the application by corresponding with the Department; this correspondence was made part of the public file.

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[1] The Department of Water and Natural Resources is now known as the Department of Environment and Natural Resources.

Following an evidentiary hearing, the BME issued SDDS a one-year permit (Original Permit) on September 7, 1989, under SDCL 34A-6-1.16.[2] TIP appealed to the circuit court, which affirmed the BME's decision, despite purported errors regarding issuance of an Environmental Impact Statement, ex parte communications about the permit, and alleged deficient findings by the BME. A subsequent appeal was brought to this Court. *In re* Application of SDDS, Inc. for a *Solid Waste Permit*, 472 N.W.2d 502 (SD 1991)(*SDDS I*). On June 26, 1991, we reversed and remanded the decision to the BME for more specific findings to support the Original Permit regarding the public interest in and the environmental safety of the Lonetree dump.[3] SDDS I, 472 N.W.2d at 513-14. Without such findings, the permit was void. Id.

While *SDDS I* was winding through the judicial system, a series of other events transpired. In March of 1990, SDDS petitioned the Department and Board for a five-year Renewal Permit to allow it to dispose of 7.75 million tons of MSW, 90% of which would be imported from other states. During this time, Action for the Environment (ACT),[4] the public interest arm of TIP, was collecting petitions to put an Initiative on the November 6, 1990 general ballot. The Initiative required legislative approval for solid waste facilities with yearly capacities over 200,000 tons. This Initiative passed on election day, to take effect on November 22,

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[2] Between the application and issuance of the permit, the Department failed to act on the application within the requisite 120-day period. SDDS sued, and the Sixth Judicial Circuit directed the Department to act.

[3] To permit a waste facility to be located, the BME must find that it is in the public interest. SDCL 34A-6-1.13. This requires revelation of the facts underlying such a decision by the BME. *Lemke* v. *Rabenberg's, Inc.*, 89 S.D. 386, 233 N.W.2d 336 (1975). However, the BME made only conclusory findings regarding SDDS. Further, the BME's findings about the environmental safety of the facility were similarly lacking in explicit factual basis, making review difficult under the Administrative Procedures Act, SDCL 1-26-25.

[4] ACT was formerly known as the Surface Mining Initiative Fund (SMIF).

1990.[5] On November 7, 1990, SDDS laid off workers and ceased site preparations. It alleged that up to that time, it had expended over five million dollars in pursuit of the facility.[6]

At this point, the Department had yet to act on the Renewal Permit. On December 7, 1990, however, the Department granted the five-year Renewal Permit to SDDS, following another contested hearing. In January of 1991, SDDS filed suit in the Sixth Judicial Circuit, alleging $100 million in damages for inverse condemnation caused by the Initiative. SDDS voluntarily dismissed the action in the fall of 1991. Also in January 1991, a bill was introduced in the South Dakota Legislature to provide SDDS with the authorization needed to site and operate Lonetree. The bill, Senate Bill 169 (SB 169), passed both houses and was signed by Governor Mickelson in February, to take effect on July 1, 1991. In May, a Referendum

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[5] The tenets of the initiative were codified at SDCL 34A-6-53 et seq.:

**SDCL 34A-6-53. Legislative approval required for large-scale solid waste facilities--Requirements.** No large-scale solid waste facility may be sited, constructed or operated in this state unless the Legislature enacts a bill approving the siting, construction or operation of such facility pursuant to a solid waste permit or permit renewals, issued by the board of minerals and environment. The Legislature must find that the facility is environmentally safe and in the public interest.

**SDCL 34A-6-54. Definition of large-scale solid waste facility.** A large-scale solid waste facility is any single facility, or two or more facilities operated as a single unit, in which over two hundred thousand tons of solid waste is disposed or incinerated per year.

**SDCL 34A-6-55. Existing facilities to cease until legislative approval is obtained.** The board of minerals and environment shall cause any existing large-scale solid waste facility to cease operation unless or until legislative approval as prescribed in s 34A-6-53 has been obtained.

**SDCL 34A-6-56. Approval requirements are retroactive.** The provisions of §§ 34A-6-53 to 34A-6-56, inclusive, are retroactive to July 1, 1989.

[6] There is some dispute over whether it was appropriate for the circuit court, in the case we now consider, to characterize SDDS' claim for damages at $5.6 million or at $100 million.

petition was filed with the Secretary of State's office, referring SB 169, seeking to overturn the legislative authorization for Lonetree, and to put the matter to a vote in November 1992. However, in June 1991, SDDS I was issued, reversing the right to develop and site the facility under the one year permit. SDDS I, 472 N.W.2d at 514.

In September 1991, the BME held a rehearing on the Original Permit, pursuant to direction from *SDDS I*. It made additional findings of fact regarding the public interest and environmental safety issues, based on the 1989 record. It issued no orders and no new permit, nor did it reissue the Original Permit. Then, in February 1992, we decided *SDDS, Inc.* v. *State of South Dakota*, 481 N.W.2d 270 (SD 1992)(*SDDS II*). In that case, we held that SDDS was not authorized to start operations until after the 1992 Referendum vote. In the meantime, the Seventh Judicial Circuit was considering an appeal from the BME's findings, and, in the spring of 1992, that court concluded we had reversed issuance of the Original Permit by virtue of *SDDS II*. So, the case was remanded to the BME. On April 16, 1992, the BME declined to reissue the Original Permit, despite the circuit court's remand, because it wanted to wait until this Court decided the matter.

During this time, a constitutional challenge to the Initiative was pending in the Sixth Judicial Circuit. On October 31, 1991, the circuit court upheld the constitutionality of the Initiative in all material respects.[7] No appeal followed. The next month, SDDS filed a second takings-inverse condemnation action, having voluntarily dismissed the takings case pending in Hughes County. This time, suit was filed in Fall River County (Seventh Judicial Circuit) claiming $100 million in damages arising from both the Initiative and Referendum. The State appealed the venue of this action, and we ruled in June 1993 that Hughes County, not Fall

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[7] Circuit Judge Zinter found that the Initiative did not violate the equal protection clause or the dormant commerce clause. He also found that no due process rights were violated concerning the Renewal Permit, as SDDS had no property right in it. On the Original Permit, he found due process rights were violated insofar as the Initiative's retroactive application affected SDDS.

River County, was the appropriate venue. *SDDS, Inc.* v. *State of South Dakota*, 502 N.W.2d 852 (SD 1993)(*SDDS III*).

Still in question at this point was the validity of the Original Permit and the later Renewal Permit. In July 1992, the Seventh Judicial Circuit held that the Original Permit had been revoked by our actions in *SDDS I*. This was appealed, and we upheld the decision in *Matter of 1990 Renewal Application of SDDS*, 507 N.W.2d 702 (SD 1993)(*SDDS IV*). We noted that no permit existed after we remanded it to the BME for more findings in *SDDS I*. "One thing is absolute: Without proof of public interest, no permit could have been properly issued." *Id.* at 703. "We have yet to see such a finding [of public interest] ... therefore, the permit cannot be said to have ever been valid." *Id.*

While public and legal maneuvering continued in state venues, SDDS took another route, challenging the Initiative and Referendum in federal court. See *SDDS, Inc.* v. *State of South Dakota*, 994 F.2d 486 (8thCir.1993) (*Lonetree I*) (holding the Sixth Judicial Circuit's October 31, 1991 decision did not bar by virtue of *res judicata* and collateral estoppel federal constitutional appeal of Referendum); *SDDS, Inc.* v. *State of South Dakota*, 843 F.Supp. 546 (D.S.D.1994)(*Lonetree II*) (holding Referendum did not violate due process rights, equal protection rights, or the dormant commerce clause); *SDDS, Inc.* v. *State of South Dakota*, 47 F.3d 263 (8thCir.1995) (*Lonetree III*)(reversing *Lonetree II* and holding Referendum violated the dormant commerce clause; declining to rule on due process and equal protection claims). The Eighth Circuit Court of Appeals, in *Lonetree III*, found that the Referendum was improper state protectionism, violating the dormant aspects of the Commerce Clause of the United States Constitution, Art. 1 § 8, Clause 3.

Finally, the present action came to the fore. After *SDDS III*, this second takings case was transferred to Hughes County, Sixth Judicial Circuit. SDDS seeks damages for an unconstitutional taking under the Fifth and Fourteenth Amendments to the United States Constitution and Article VI, Section 13 of the South Dakota Constitution. The complaint now alleges that the damages occurred only from the Referendum, not the Initiative. The period affected by the taking spanned the time between July 1, 1991, the date

legislative approval of Lonetree would have taken effect absent the Referendum, and February 6, 1995, the date the Eighth Circuit Court of Appeals ruled in *Lonetree III* that the Referendum was unconstitutional.

Both parties moved for summary judgment, and on January 18, 1996, the Sixth Judicial Circuit granted the State's motion. SDDS appeals, offering four issues for our consideration: (1) Did the trial court follow required summary judgment standards in granting the State's motion? (2) Did SDDS have a constitutionally protected property interest or use interest to develop and operate Lonetree that was taken by the Referendum? (3) Did the Referendum effect a regulatory taking of property entitling SDDS to just compensation? (4) Was the Referendum the proximate cause of the taking damages alleged by SDDS?

**Analysis and Decision**

The Eighth Circuit Court of Appeals recently issued *In re SDDS, Inc.*, 97 F.3d 1030 (8thCir.1996)(*Lonetree IV*), which bars the State from arguing SDDS had no legitimate entitlement to a permit. Defendants can no longer argue SDDS had no property right that could be threatened by an unconstitutional taking. Construing its holding in *Lonetree III*, the Eighth Circuit noted that "all of the factual predicates and legal requirements for SDDS' permit had been met [and] was necessarily dispositive of SDDS' property interest in the permit itself." *Lonetree IV*, 97 F.3d at 1039. Further, the court held that the State was barred from disputing "whether the referendum was the proximate cause of SDDS' dissolution...." *Id.* at 1040.

This holding pointedly curtails our examination of the subject. Federal court power to enjoin a party from relitigating an issue in state court previously decided in a federal forum is clear. It stems from the Anti- Injunction Act, 28 USC § 2283,[8] which reinforces

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[8] The relevant language of the Act is as follows:

A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

the federal interest in assuring appropriate supremacy under the Constitution. *Fond du Lac Band of Chippewa Indians* v. *Carlson*, 68 F.3d 253, 255 (8thCir.1995); *Daewoo Electronics* v. *Western Auto Supply Co.*, 975 F.2d 474, 477 (8thCir.1992). The Eighth Circuit's decision is authorized from one of the two exceptions to the Act--the "relitigation exception." *McFarland* v. *Scott*, 512 U.S. 849, 857, 114 S.Ct. 2568, 2573, 129 L.Ed.2d 666, 675 (1994); *Daewoo*, 975 F.2d at 477. See *Ex parte Young*, 209 U.S. 123, 159, 28 S.Ct. 441, 453, 52 L.Ed. 714, 729 (1908)(empowering federal courts to enjoin a state from unconstitutional conduct). "The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of res judicata and collateral estoppel." *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 147, 108 S.Ct. 1684, 1690, 100 L.Ed.2d 127, 136 (1988).

The Eighth Circuit decided in *Lonetree IV* that its holding in Lonetree III, while specifically dispositive of the dormant commerce clause issue, also rejected the State's arguments that SDDS held no property interest in the MSW facility and that the Referendum had no effect on its operation of it. 97 F.3d at 1038. Therefore, South Dakota "had one full and fair opportunity to litigate these issues in the federal forum, and the rules of equity do not require that they be given a second bite at the apple in the state forum in order to obtain a more favorable result." *Id.* at 1041.

As such, we are bound by the dictates of *Lonetree IV*, both by reason of the exception to the Anti-Injunction Act, as well as by principles of comity, *res judicata*, and collateral estoppel.[9] The

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The Act itself is a "necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts." *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 146, 108 S.Ct. 1684, 1689, 100 L.Ed.2d 127, 135 (1988).

[9] Although we cannot reach the merits, our analysis of our own case law may have produced a different result. It is a clear principle of takings jurisprudence that, to be compensated, one must be deprived of a portion of the bundle of rights in the property that existed when one obtained title to the property. *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003,

1027, 112 S.Ct. 2886, 2899, 120 L.Ed.2d 798, 820 (1992). In determining what range of interests an owner can claim a right to, the Supreme Court has resorted to "existing rules or understandings that stem from an independent source such as state law." *Id.* at 1030, 112 S.Ct. at 2901, 120 L.Ed.2d at 822 (quotation omitted). Two bodies of state law exist in South Dakota to provide such an "independent source." First, pervasive solid waste regulations precluded a vested property right in the bundle of rights. *Cecos International, Inc.* v. *Jorling*, 706 F.Supp. 1006, 1030 (N.D.N.Y.1989)(holding there was no property right in a solid waste permit until the administrative process was final). Extensive powers were then and continued to be granted to the Department to permit and oversee the construction and operation of solid waste disposal facilities. At the time, SDCL 34-16B et seq. (1967 & 1976 Supp) controlled a vast legislative authorization for the Department to undertake such activities. Such authority, both in statutes and administrative rules, has continued throughout the existence of SDDS. Simply buying the land gave SDDS no right to site Lonetree. It had to successfully complete our permitting process. *Mitchell Arms, Inc.* v. *United States*, 7 F.3d 212, 216 (Fed.Cir.1993), cert. denied, 511 U.S. 1106, 114 S.Ct. 2100, 128 L.Ed.2d 662 (1994)(industries with extensive government regulation may not have the "right to exclude" the government from their dealings); cf. *Kaiser Aetna* v. *United States*, 444 U.S. 164, 179-80, 100 S.Ct. 383, 393, 62 L.Ed.2d 332, 346 (1979)("right to exclude" fundamental element of property right falls within category of interests government cannot take without compensation).

SDDS never finally and successfully completed the permitting process required by our comprehensive regulations. We held that the Original Permit was void, absent valid findings by the BME. See *SDDS II*, 481 N.W.2d at 273 (Amundson, J., concurring in result)(noting, as author of *SDDS I*, that "the failure of an administrative agency to make express findings of fact where such findings are required, renders the administrative determination void."). The Original Permit was granted by the BME in September, 1989. It immediately, however, was subject to judicial review under SDCL 1-26-30, 1-26-30.2, and 1-26-37. Such review, when triggered, calls into question the continued validity of the permit. Any right to operate under SDCL 1-26-28, pending full appellate review, was no more final than the Original Permit was at that time. See *In re Silver King Mines*, 315 N.W.2d 689 (S.D. 1982). For the Original Permit to have been valid from the beginning, it must have been supported by a finding by the BME of public interest, SDCL 34A-6-1.13, and of environmental safety, ARSD Art 74:27. It was not supported by sufficient

findings of either; therefore, at that point already, the Original Permit was void. Because of this initial deficiency, we remanded *the O*riginal Permit to the BME to make further findings on both issues. *SDDS I*, 472 N.W.2d at 513. It is noteworthy that *SDDS I* was issued June 26, 1991, which was before July 1, 1991, the date on which legislative approval for Lonetree was to take effect and the date on which the taking allegedly began to occur.

Along with the failure of the regulation process, SDDS was prevented from asserting that it had, as a portion of its "bundle of rights" existing at the time of purchase, a right to operate the MSW facility because of South Dakota's unique voter involvement and the ever-present possibility of direct citizen intervention, through initiatives and referenda, in controversial topics affecting the welfare of the Sate. In addition to the various permitting hurdles and judicial review that needed to be undertaken, SDDS was very aware of the strong public opposition to the facility. While the existence of opposition to a matter need not necessarily trigger undue action, it is apparent that the campaign launched by ACT in the Legislature, over the airwaves, and in print media was not a case of simple opposition. In a state like South Dakota, an initiative or referendum on a hotly-contested issue is routine. In fact, it is notable that South Dakota was the first state to create direct, participatory power by its citizens. See *Christensen* v. *Carson*, 533 N.W.2d 712, 714 n* (SD 1995); *Wyatt* v. *Kundert*, 375 N.W.2d 186, 192-93 (S.D. 1985); *Byre* v. *City of Chamberlain*, 362 N.W.2d 69 (S.D. 1985)(generally, all legislative matters in which the people have an interest are subject to a referendum). In matters that spark statewide interest, South Dakotans truly rely on the maxim that "all power derives from the people" and often act accordingly. *Wyatt*, 375 N.W.2d at 193 (quoting *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668, 672-73, 96 S.Ct. 2358, 2361-62, 49 L.Ed.2d 132, 137 (1976)). Witness our State motto: "Under God the people rule." Therefore, like the purveyor of the water right in *Broughton Lumber Co.* v. *United States* who was affected by subsequent passage of a Congressional act, SDDS was affected by the referral of a legislative act. 30 Fed. Cl. 239 (1994). The analysis is similar:

> The relevant inquiry ... is whether, absent passage of the [new Congressional act], existing rules and regulations would favor approval of the hydroelectric project. The answer is that they would not.... [O]ne would have to conclude that, had plaintiff proceeded with its license application, it could not have expected clear sailing.

*Broughton Lumber*, 30 Fed. Cl. at 243. As the court held in that case,

following four tests must be met to sustain collateral estoppel:

> (1) The issue decided in the prior adjudication was identical with the one presented in the action in question;
>
> (2) There was a final judgment on the merits;
>
> (3) The party against whom the plea is asserted was a party or in privity with a party to the prior adjudication; and
>
> (4) The party against whom the plea is asserted had a full and fair opportunity to litigate the issue in the prior adjudication.

*Grand State Property, Inc.* v. *Woods, Fuller*, et al., 1996 SD 139, P 12, 556 N.W.2d 84, 87 (quoting *Black Hills Novelty Co., Inc.* v. *South Dakota Commission on Gaming*, 520 N.W.2d 70, 73 (S.D. 1994)(other internal citations omitted)); see *Grand Laboratories, Inc.* v. *United States*, 882 F.Supp. 906, 909 (D.S.D. 1995)(applying collateral estoppel under South Dakota law). Under this test, *Lonetree III* satisfies all the elements. The Eighth Circuit has held the issues of proximate cause and entitlement to a permit were conclusively determined in that case; the State is the same party against whom the prior adjudication was rendered; and the State had a full and fair opportunity to defend its claim at that point.[10]

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SDDS' "mere unilateral expectation or ... abstract need is not a property interest entitled to protection." Id. (quoting *Web's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446, 451, 66 L.Ed.2d 358, 364-65 (1980)).

Simple government encouragement to private parties to put capital into a risky business does not create a vested property right compensable under a takings scenario, especially in a state that has a vibrant history of direct citizen involvement and a formidable regulation scheme requiring strict compliance. *Allied-General Nuclear Services* v. *United States*, 839 F.2d 1572, 1578 (Fed.Cir.1988), cert. denied, 488 U.S. 819, 109 S.Ct. 61, 102 L.Ed.2d 39 (1988)(holding a property right was not created when state officials attempted to persuade Allied-General to build a nuclear power plant).

[10] The Eighth Circuit aptly invoked our previous holdings on these issues. *Lonetree IV*, 97 F.3d at 1039-40 (quoting the tenets of collateral estoppel from *Moe* v. *Moe*, 496 N.W.2d 593, 595 (S.D. 1993)).

Closely tied to the rule of collateral estoppel, and also binding on this Court in this instance, is the principle of *res judicata*. "The doctrine of *res judicata* serves as claim preclusion to prevent relitigation of an issue actually litigated or which could have been properly raised and determined in a prior action." *Hogg* v. *Siebrecht*, 464 N.W.2d 209, 211 (S.D. 1990). The purpose behind the doctrine is to protect parties "from being subjected twice to the same cause of action, since public policy is best served when litigation has a finality." *Moe* v. *Moe*, 496 N.W.2d 593, 595 (S.D. 1993). We apply the same principles of collateral estoppel to *res judicata*, so the analysis above is equally applicable in this instance. *Springer* v. *Black*, 520 N.W.2d 77, 79 (S.D. 1994)(citing *Raschke* v. *DeGraff*, 81 S.D. 291, 295, 134 N.W.2d 294, 296 (1965)).

Finally, the doctrine of comity dictates that we accede to the decision of the Eighth Circuit in *Lonetree IV*. The following factors, needed for comity, are present here:

> (1) The foreign court actually had jurisdiction over both the subject matter and the parties;
>
> (2) The decree was not obtained fraudulently;
>
> (3) The decree was rendered by a system of law reasonably assuring the requisites of an impartial administration of justice--due notice and a hearing; and
>
> (4) The judgment did not contravene the public policy of the jurisdiction in which it is relied upon.

*State* v. *Daly*, 454 N.W.2d 342, 344 (S.D. 1990)(recognizing a federal court's determination based on comity). The federal courts certainly had jurisdiction over this federal constitutional matter, and there is no allegation the decree in *Lonetree IV* was obtained by fraud, by violating due notice and hearing requirements, or by contravening public policy.

Therefore, we are bound by the recent judgment of the Eighth Circuit. To rule in any other fashion would uselessly encourage "future state defendants ... to effectively ignore judgments rendered in the federal courts, generating needless relitigation in the state courts, and rendering our judgments largely nugatory and advisory." 97 F.3d at 1035-36 (discussing the Eleventh Amendment immunity

asserted by the State). We are unwilling to beget such a result, and therefore remand the case to the circuit court for a jury's determination of what, if any, damages SDDS suffered at the hands of the State.

Reversed and remanded.

MILLER, C.J., and AMUNDSON and GILBERTSON, JJ., concur.

SABERS, J., concurs in result.

SABERS, Justice (concurring in result).

I agree with the analysis in footnote 9 and therefore concur in result.

**APPENDIX B**

| | | |
|---|---|---|
| STATE OF SOUTH DAKOTA ) | | IN CIRCUIT COURT |
| ) SS | | |
| COUNTY OF HUGHES ) | | SIXTH JUDICIAL CIRCUIT |

| | | |
|---|---|---|
| SDDS, Inc., a South Dakota Corporation, | * | CIV. NO. 93-324 |
| Plaintiff, | * | |
| -vs- | * | |
| STATE OF SOUTH DAKOTA, WALTER D. MILLER, as as Governor, JOYCE HAZELTINE, as Secretary of State, and MARK BARNETT, as Attorney General for the State of South Dakota, | * | **MEMORANDUM DECISION[1] ON CROSS-MOTIONS FOR SUMMARY JUDGMENT** |
| Defendants. | * | |

This suit for inverse condemnation arises out of the failure of the Lonetree solid waste facility (Lonetree). SDDS, the developer of Lonetree, seeks takings damages under the Fifth and Fourteenth Amendments of the United States Constitution and Article VI, section 13 of the South Dakota Constitution. Cross-motions for summary judgment are pending before the Court. The issue is whether SDDS was subjected to a temporary taking during the

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[1] The citations in this Decision have been changed to conform with the citation system adopted by South Dakota Supreme Court Rule 95-13 effective January 1, 1996.

limited time an unconstitutional Referendum was in effect.[2] This Court concludes that no compensable taking occurred because SDDS never possessed a property right or a use interest to develop the facility. SDDS has also failed to demonstrate, for purposes of SDCL 15-56(e), that its alleged takings damages were proximately caused by the temporary effect of the Referendum. The State of south Dakota's (State's), Motion for Summary Judgment is granted.

## FACTS & PROCEDURAL HISTORY

The history of the proceedings leading up to these motions is lengthy.[3] In 1988, SDDS purchased undeveloped agricultural

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[2] The Referendum was approved at the November 1992 general election concerning Referred Law 1. The Referendum was recently declared unconstitutional by the Eighth Circuit Court of Appeals. *SDDS, Inc.* v. *State of South Dakota*, 47 F3d 263, 272 (8th Cir. 1995) (Lonetree III).

[3] For a more complete chronological history of the litigation concerning these parties, *see SDDS, Inc.* v. *South Dakota Dep't of Water & Natural Resources*, Civ. Case No. 89-179 (SD 6th Cir. Ct. July 5, 1989) (ordering the DENR to act upon SDDS' application for a permit to site, construct and operate a solid waste disposal facility in South Dakota); *In the Matter of Application of SDDS*, 472 NW2d 502 (SD 1991) (*SDDS I*) (reversing and remanding the grant of a one-year permit by the Board of Minerals and Environment for sufficient factual findings that the proposed solid waste disposal facility is in the public's interest); *SDDS, Inc.*, v. *State of South Dakota*, 481 NW2d 270 (SD 1992) (*SDDS II*) (holding SDDS not authorized to commence operations of the disposal facility until after the 1992 general election vote on the referred issue); *SDDS, Inc.*, v. *State of South Dakota*, Civ. Case No. 90-412 (SD 6th Cir. Ct. Oct. 31, 1991) (holding the initiative measure to be constitutional); *SDDS, Inc.*, v. *State of South Dakota*, 502 NW2d 852 (SD 1993) (*SDDS III*) (holding the proper venue for determination of issues in these matters is the state capitol); *In re Matter of 1990 Renewal Application of SDDS*, 507 NW2d 702 (SD 1993) (*SDDS IV*) (holding one-year permit invalid and five-year renewal permit void *ab initio*); *SDDS, Inc.*, v. *South Dakota*, 994 F2d 486 (8th Cir. 1993) (*Lonetree I*) (holding federal action challenging constitutionality of state referendum was not barred by the doctrines of res judicata or collateral estoppel despite state circuit court's ruling that state initiative measure was constitutional); *SDDS, Inc.* v. *South Dakota*, 843 F. Supp. 546 (DSD 1994) (*Lonetree II*) (holding state referendum did not

property in Fall River County to develop a large-scale municipal solid waste disposal facility. In September 1989, the South Dakota Board of Minerals and Environment (Board) granted SDDS a one-year permit to site, construct and operate the facility on SDDS' property. Had it been valid, this permit would have allowed SDDS to dispose of 300,000 tons of municipal solid waste over the course of a year. Before the one-year permit expired, SDDS applied for a five-year renewal permit. On December 5, 1990, the Board renewed the original permit for five years. Had the five-year renewal permit not been void, it would have allowed SDDS to dispose of 7.75 million tons of municipal solid waste over five years.

However, opponents challenged both permits before either administrative decision became final. Judicial challenges were initiated by filing timely appeals in Circuit Court, and ultimately, the Supreme Court of this State. In June of 1991, the South Dakota Supreme Court held that the Board had not made sufficient findings of fact to determine that the one-year permit was in the public interest. *In the Matter of Application of SDDS, Inc.*, 472 NW2d 502, 514 (SD 1991) (*SDDS I*). *See also* SDCL 34A-6-1.13. Accordingly, the Supreme Court "reversed" the decision of the Board granting the one-year permit and remanded the matter for further findings. *Id.* at 514. *See also SDDS, Inc.* v. *State of South Dakota*, 481 NW2d 270, 271 n.1 (SD 1992) (*SDDS II*). As a result of that reversal in *SDDS I*, "[n]o permit could have been properly issued." *Matter of 1990 Renewal Application of SDDS*, 507 NW2d 702, 703 (SD 1993) (*SDDS IV*). Although the Board did issue more detailed findings on remand in September of 1991, it did not issue a new permit. In fact, it has never reissued the permit.

The five-year permit renewal was also appealed. On March 30, 1992, before the Referendum election, the Seventh Judicial Circuit Court ruled that the one-year permit had been revoked by

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violate due process rights of SDDS; did not violate the commerce clause; and did not violate equal protection rights of SDDS); *SDDS, Inc.* v. *State of South Dakota*, 47 F3d 263 (8th Cir 1995) (*Lonetree II*) (holding the referendum election unconstitutional as a violation of the Commerce Clause).

the holding of *SDDS I. In the Matter of the 1990 Renewal Application of SDDS*, Civ. No. 91-588, (SD 7th Cir. Ct. Mar 30, 1992). On July 14, 1992, the Seventh Circuit Court also held that because the one-year permit was not "in existence at the time the five-year permit was granted, the five-year permit was and is void *ab initio*." *Id.* The South Dakota Supreme Court affirmed the Seventh Circuit Court's conclusion that the permits were invalid and void *ab initio*. *SDDS IV*, 507 NW2d at 704. Although the Supreme Court reversed and remanded this case for further consideration by the Board, SDDS has also not pursued the re-issuance of the five-year permit.

During the course of the permitting process and judicial review, Initiative Measure No. 1 was placed on the 1990 general election ballot. On November 6, 1990, South Dakota voters approved the Initiative. The initiated law required legislative approval of large-scale solid waste disposal facilities, including Lonetree.[4] On November 7, 1990, the day after passage of Initiative Measure No. 1, SDDS laid off its work force and stopped active development of

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[4] The Initiative Measure is codified at SDCL 34A-6-53 through 34A-6-56 (1992). It provides:

> No large-scale solid waste facility may be sited, constructed or operated in this state unless the Legislature enacts a bill approving the siting, construction or operation of such facility pursuant to a solid waste permit or permit renewals, issued by the board of minerals and environment. The Legislature must find the facility is environmentally safe and in the public interest. SDCL 34A-6-53.
>
> A large-scale solid waste facility is any single facility, or two or more facilities operated as a single unit, in which over two hundred thousand tons of solid waste is disposed or incinerated per year. SDCL 34A-6-54.
>
> The board of minerals and environment shall cause any existing large-scale solid waste facility to cease operation unless or until legislative approval as prescribed in § 34A-6-53 has been obtained. SDCL 34A-6-55.
>
> The provisions of §§ 34A-6-53 to 34A-6-56, inclusive, were retroactive to July 1, 1989. SDCL 34A-6-56.

the facility. By that time, SDDS alleges that it had spent $5.6 million in development of the project.

SDDS immediately challenged the Initiative in this Court, and at the same time, it sought the legislative approval required by the Initiative. On October 31, 1991, this Court upheld the constitutionality of the Initiative in all material respects. *SDDS, Inc.* v. *State of South Dakota*, Civ. Case No. 90-412 (6th Cir. Ct. Oct 31, 1991). That decision was not appealed and has become final. However, during the 1991 Legislative Session, SDDS secured legislative approval for Lonetree (although the validity of the permits was still being litigated in court.) The legislative approval was granted by the passage of Senate Bill 169.

Senate Bill 169 was to take effect on July 1, 1991. *SDDS II*, 481 NW2d at 272. However, on June 26, 1991, the Supreme Court reversed SDDS' right to develop Lonetree under the one-year permit. *SDDS I*, 472 NW2d at 514.

On May 8, 1991, the Referendum petition, which is the subject of this suit, was filed. The Referendum petition sought to reverse the legislative approval of Lonetree granted in Senate Bill 169. A vote on the petition was scheduled for the November 1992 general election. In that Referendum election, the voters reversed the legislative approval of Lonetree.

SDDS filed suit to test the constitutionality of the Referendum election. SDDS also filed two suits alleging Fifth Amendment takings as a result of the Initiative and the Referendum.

The Referendum challenge was filed in the federal courts. *See SDDS, Inc.* v. *State of South Dakota*, 47 F3d 263 (8th Cir 1995) (Lonetree III); *SDDS, Inc.* v. *State of South Dakota*, 843 F. Supp. 546 (DSD 1994) (Lonetree II); *SDDS, Inc.* v. *State of South Dakota*, 994 F2d 486 (8th Cir. 1993) (Lonetree I). On February 6, 1995, the Eighth Circuit Court of Appeals declared the 1992 Referendum election unconstitutional in violation of the Commerce Clause of the United States Constitution. *Lonetree III*, 47 F.3d at 272. The Eighth Circuit Court of Appeals did not rule on any Fifth Amendment Takings claims.

The first of SDDS' two takings suits was filed in this Court in January of 1991, prior to the filing of the Referendum petition.

SDDS sought $100 million under the theory that the *Initiative and the Referendum* caused an inverse condemnation of the entire Lonetree project. In the fall of 1991, SDDS voluntarily dismissed that suit. Shortly thereafter, SDDS filed a second suit in the Seventh Judicial Circuit, Fall River County, again alleging a $100 million taking claim due to the Initiative and the Referendum. Although SDDS alleged that Hughes County was not the appropriate venue for that suit, the South Dakota Supreme Court held that the proper venue was the Sixth Judicial Circuit, Hughes County. *SDDS, Inc.* v. *State of South Dakota*, 502 NW2d 852, 857 (SD 1993) (SDDS III). Accordingly, the $100 million takings claim was transferred to this Court.

After the suit was transferred to this Court, SDDS amended its takings claim. SDDS eliminated any claim for damages as a result of the Initiative. SDDS now alleges that a *temporary* taking occurred because of "restrictions" placed on Lonetree during the limited time period the unconstitutional Referendum was in effect. SDDS no longer seeks $100 million for a total taking of the Lonetree facility. SDDS reduced its claim to $5.6 million for the alleged temporary taking.

SDDS specifically alleges that the temporary taking commenced on July 1, 1991, the date legislative approval of Lonetree would have been effective under Senate Bill 169 had the Referendum not been filed. SDDS alleges that the temporary taking ended on February 6, 1995, the date the Eighth Circuit Court of Appeals declared the Referendum Election unconstitutional. SDDS alleges that during that time its $5.6 million development costs were taken without just compensation. SDDS contends that although its permits to site, construct and operate the facility were invalid and void *ab initio* under South Dakota law, a compensable taking should not depend on the status of its permits. If its permit status is material, SDDS contends that it was "entitled" to the permits because it complied, or could comply with the necessary permitting requirements.

SDDS finally contends that even if it had no property right to construct and operate the facility, a $5.6 million taking occurred because the Referendum served no legitimate state purpose.

The State raises a number of responses. The State first points out that SDDS has never possessed a valid permit to site, construct or operate a municipal solid waste disposal facility. The State contends that in the absence of a permit, no taking occurred because the Referendum did not proscribe a use interest which was a part of SDDS' property rights in the Fall River County property. This Court need not address the State's other responses. This Court concludes that no taking occurred because SDDS has never possessed a property right to use its property in the manner proscribed by the Referendum.

## SUMMARY JUDGMENT

Summary judgment is authorized if the moving party has demonstrated there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Nelson* v. *WEB Water Dev. Ass'n Inc.*, 507 NW2d 691, 693-94 (SD 1993); *Koeniguer* v. *Eckrich*, 422 NW2d 600, 601 (SD 1988); *Groseth Int'l Inc.* v. *Tenneco, Inc.*, 410 NW2d 159, 164 (SD 1987); *Wilson* v. *Great Northern Railway Co.*, 83 SD 207, 157 NW2d 19, 21 (1968). The evidence must be viewed in a light most favorably to the nonmoving party, and all doubts are resolved in favor of the nonmoving party. *Nelson*, 507 NW2d at 694. Here, both parties have moved for summary judgment and there is no genuine issue of material fact. Therefore, summary judgment is appropriate as a matter of law. *Hamaker* v. *Kenwel-Jackson Machine, Inc.*, 387 NW2d 515, 517 (SD 1986).

## FIFTH AMENDMENT TAKINGS CLAIM

The Fifth Amendment of the United States Constitution prohibits the State from taking property without just compensation.[5] This same prohibition is found in the South Dakota Constitution.[6]

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[5] The Fifth Amendment of the United States Constitution provides "nor shall private property be taken for public use without just compensation." U.S. Const. Amend. V.

[6] Article VI, section 13 of the South Dakota Constitution provides "[p]rivate property shall not be taken for public use or damaged, without just compensation..... SDConstArt VI, § 13. Claims under Article VI, section 13 of the South Dakota Constitution are analyzed in a similar

The Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 US 40, 49, 80 SCt 1563, 1569; 4 LEd2d 1554, 1561 (1960). However, "the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by . . . 'existing rules or understandings' . . . . *Lucas* v. *South Carolina Coastal Council*, 505 US 112 S.Ct. 2886, 2901, 120 LEd2d 798, 822 (1992). As the Supreme Court specifically recognized in *Lucas*, "there can be no compensable interference if [the land use in question] was not permitted at the time the owner took title to the property." *M & J Coal Co.* v. *United States*, 47 F3d 1148, 1153 (Fed. Cir. 1995). Therefore, in order for a party to recover compensation under a Fifth Amendment takings claim, the party must first demonstrate that its property interests, or "bundle of sticks," include a use interest not already proscribed by existing rules and understandings. *Lucas*, 505 U.S. at 112 S.Ct. at 2899, 120 LEd2d 798, 822 (1992); *Kaiser Aetna* v. *United States*, 444 US 164, 179-80, 100 S.Ct. 383, 39293, 62 LEd2d 332, 345-46 (1979); *Preseault* v. *United States*, 27 Fed. Cl. 69 (1992). If the party can establish such an interest, it must then establish that the interest was taken. The two-step inquiry has been described as follows:

> *First*, a court should inquire into the *nature of the land owner's estate* to determine whether the *use interest proscribed* by the governmental action *was part of the owner's title to begin with*, i.e., whether the land use interest was a "stick in the bundle of property rights" acquired by the owner. Second, *if the claimant can establish the existence of such an interest*, the court must *then* determine whether the governmental action at issue constituted a compensable taking of that "stick." In making the second determination, the court must consider such factors as the character of the governmental action, the economic impact of the action on the claimant, and the extent

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manner as claims under the federal constitutional provision. *See generally*, *US West Communications* v. *Public Utilities Comm'n*, 505 NW2d 115, 126 (SD 1993); *Barney* v. *Burlington Northern R. R. Co. Inc.*, 490 NW2d 726, 733 (SD 1992).

> to which the action has interfered with the claimant's distinct investment-backed expectations.

*M & J Coal Co.*, 47 F3d at 1154 (citations omitted) (emphasis added). Although SDDS only claims a "temporary taking," a temporary taking claim does not change these tests. "'[T]emporary' takings . . . are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 US 304, 318, 107 Sct 2378, 2388, 96 LEd2d 250, 266 (1987). *See also US West Communications* v. *Public Utilities Comm'n*, 505 NW2d 115, 127 (SD 1993).

Therefore, in order to prevail, SDDS must first establish that at the time the Referendum was in effect SDDS' property rights in the Fall River County property included a use interest to site, construct and operate a large-scale solid waste disposal facility. If SDDS cannot establish such a use interest, this Court need not reach the second inquiry and consider whether the Referendum constituted a taking of that alleged interest.

## I. SDDS' PROPERTY RIGHTS INCLUDED NO USE INTEREST TO SITE, CONSTRUCT AND OPERATE A LARGE-SCALE SOLID WASTE DISPOSAL FACILITY.

### *A. SDDS had no INHERENT property right to site, construct and operate a large-scale solid waste disposal facility without a permit.*

SDDS argues that the purchase of the Fall River County property, in and of itself, gave SDDS a property right or use interest to site, construct and operate a large-scale solid waste disposal facility on its property. SDDS had no such right because pre-existing state law, rules and understandings prohibited such uses without a valid permit.

When SDDS acquired the Fall River County property in 1988, existing South Dakota law required a permit to site, construct and

operate a solid waste disposal facility on SDDS' property.[7] SDCL 34A-6-1.4 through 34A-6-1.39. Implementing regulations imposed further restrictions. *See generally* ARSD ch. 74:27; *In re Solid Waste Disposal Permit Application of County of Clay and City of Vermillion*, 295 N.W.2d 328 (SD 1980); *City of Brookings v. Dep't of Environmental Protection*, 274 NW2d 887 (SD 1979); *In the Matter of Solid Waste Disposal Application of City of Sioux Falls*, 268 NW2d 599 (SD 1978); *Lincoln County v. Johnson*, 257 NW2d 453 (SD 1977).

These statutes and regulations comprise the background principles of property law, rules and understandings which burdened SDDS' title at the time it obtained ownership of the Fall River County property. *See Lucas*, 505 U.S. at ____, 112 SCt at 2899, 120 LEd2d at 820. Under those statutes and regulations, SDDS was not entitled to site, construct or operate a solid waste disposal facility without a valid permit. SDDS was aware of the necessity of obtaining a valid permit. By SDDS' own admission, the right to use the Fall River County property as a solid waste disposal facility was "subject to the permitting process . . . ." *Plaintiff's Reply Brief in Response to Defendant's Motion for Summary Judgment and in Support of SDDS's Cross-Motion for Summary Judgment* at 14. In fact, SDDS designed the Lonetree facility to comply with the regulations in existence for a large-scale solid waste disposal facility. *SDDS' Exhibit 3* at 12.

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[7] SDCL § 34-16B-8 (1972) (transferred to SDCL § 34A-6-8 1977; repealed 1989) was in effect when SDDS purchased the Fall River County property. This statute provided:

> The department shall establish, by rule or regulation, solid waste disposal permits necessary to prevent, abate, or control unauthorized or unapproved disposal of solid wastes. Such requirements may be for the state as a whole or may vary from area to area, as may be appropriate to facilitate accomplishment of the purposes of this chapter, and in order to take account of varying local conditions.

*Id.* In 1989, the South Dakota Legislature passed SDCL § 34A-6-1, a similar version of the 1972 and 1977 permit requirements. This statute provides: "No person may construct, alter or operate a solid waste disposal site or facility without a permit. . . . " SDCL § 34A-6-1.4 (1992).

Consequently, SDDS was aware that the property rights it acquired when it purchased the property were burdened with all statutory and regulatory requirements for the operation of a large-scale solid waste disposal facility. Under those rules and understandings, any property right to site, construct or operate a solid waste disposal facility was subject to the successful completion. of the permitting process. This Court agrees with SDDS' assertion that private property may be used for any lawful purpose without interference by the State. However, at the time of the development of the Lonetree facility, it was not lawful *for anyone* to site, construct and operate a solid waste disposal facility without a valid permit. *See* ARSD ch. 74:27; SDCL 34A-6-1.4 through 34A-6-1.39. Therefore, SDDS had no *inherent* property right or use interest to construct and operate the facility without a valid permit.

*B. The permitting process did not expand SDDS' original property rights to include a use interest to construct and operate the facility.*

The State broadly asserts that there can be no compensable taking because the right to construct and operate a large-scale solid waste disposal facility was not part of SDDS' "original bundle of property rights." The State relies on the language of *Lucas* that the State may resist compensation "if... the proscribed use interests were not part of [the] title to begin with." From this language, the State argues that the proscribed use interest must be part of the *original* title to warrant compensation. *See Lucas*, 505 US at __, 112 SCt at 2899, 120 LEd2d at 820. This Court disagrees with the State's interpretation of *Lucas*. Rather, a proscribed use interest added to the original property rights of a party is compensable if it was added prior to the proscription[8] because compensation for a taking is determined at the time the taking occurs. It is not based upon the

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[8] Under the State's interpretation of *Lucas*, property damaged or taken by the State would only be protected only if it was part of the original property interests acquired by the owner. Under such a literal interpretation of *Lucas*, property rights subsequently acquired under existing state law, rules and understandings would not be compensable as a Fifth Amendment Taking. This view is not supported by any competent authority.

value of the property at the time of purchase. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 US at 320, 107 SCt at 2388, 96 LEd2d at 267. Therefore, the question is whether SDDS added a use interest to operate a large-scale solid waste disposal facility before the time the Referendum allegedly "restricted" SDDS' night to construct and operate Lonetree.

*1. SDDS never added a use interest to construct and operate Lonetree because SDDS never received a valid permit.*

Although SDDS enjoyed some early and limited success in obtaining permits from the responsible administrative agency, the statutory permitting process included judicial review in the Circuit and Supreme Courts of this State. SDCL 1-26-30; 1-26-30.2; 1-26-37. Because the permit applications were subject to judicial review, SDDS could not obtain a valid permit and add a use interest to its original property rights until it completed any initiated judicial review.

Here, both Board decisions granting the permits were appealed to the Seventh Judicial Circuit and the South Dakota Supreme Courts *before* the Referendum petition was filed. On June 26, 1991, *before* legislative approval of the projects was to go into effect under Senate Bill 169 and *before* the Referendum election, the Supreme Court reversed SDDS' one-year permit. *SDDS I*, 472 NW2d at 514. In the other *pending* case, the Circuit Court and the Supreme Court both determined that the one- and the five-year permits were invalid and void ab initio. *SDDS IV*, 507 NW2d at 703; *In the Matter of 1990 Renewal Application*, Civ. Case No. 91-588 (SD 7thCirCt July 14 1992). "[The one-year] permit cannot be said to have ever been valid. . . . Because the [one-year] permit, in effect, *did not legally exist, there was no permit to renew.* Therefore, the five-year permit was void *ab initio*. *SDDS IV*, at 704 (emphasis added).

These judicial determinations of the validity of SDDS' permits are unambiguous. On June 26, 1991, before the Referendum affected SDDS by delaying the effective date of Senate Bill 169, SDDS' one-year permit was reversed. The other *pending* court challenges determined that the one-year permit *did not legally exist* and the five-year permit was void *ab initio*. Because SDDS'

permits were invalid and void from the beginning, the permitting process did not expand SDDS' original property rights to include a use interest to site, construct and operate a large-scale solid waste disposal facility.

SDDS asserts that even if it did not have a valid permit, it "understood" the permits were in full force and effect. Such a unilateral understanding is, however, erroneous and immaterial in light of the Supreme Court's clear declaration that the permits were invalid and void *ab initio*. *SDDS IV*, 507 NW2d at 704.

Furthermore, SDDS chose to proceed with development of the Lonetree facility before judicial review was completed, a pre-existing limitation on the right to obtain a valid permit. Therefore, SDDS assumed the risk of proceeding with development before judicial review was completed. SDDS' decision to assume that risk precludes compensation for a taking. Only owners who can demonstrate that they purchased the property in reliance on a state of affairs that did not include the challenged regulatory regimen may establish a taking. A person who buys property with knowledge of a restraint assumes the risk of economic loss. *Concrete Pipe & Products of California, Inc. v. Construction Laborer's Pension Trust*, 508 US ___, 113 SCt 2264, 2291, 124 LEd2d 539, 579 (1993). Therefore, SDDS assumed the risk of economic loss as a result of its subjective, unilateral and erroneous "understanding" that the permits would be issued or were valid. SDDS' unilateral "understanding" did not create a property right to use the property as a solid waste disposal facility.

SDDS attempts to distinguish the first *Lucas* inquiry by arguing that the background principles of state law do not include "statutes or regulations . . . in exercise of the state's police powers," but must only arise out of the state's nuisance law (SDCL Chapter21-10). SDDS argues that pre-existing restrictions do not include South Dakota statutes on solid waste landfill facilities. SDDS further argues that under the State's nuisance law, Lonetree could only be stopped if it were operated in a manner to create a nuisance. SDDS claims that it would not have operated Lonetree in such a manner and therefore, there were no state law restrictions on its use of the property. SDDS' arguments are erroneous in two respects.

First, the pre-existing restrictions recognized in *Lucas* not only include general nuisance laws, but also other laws, rules or understandings which restrict the use of property. In *Lucas*, the United States Supreme Court specifically held that a taking will not occur if the restrictive legislation does "no more than duplicate the result that could have been achieved in the courts -- by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, *or otherwise*." *Lucas*, 505 US at ___, 112 SCt at 2900, 120 LEd2d at 821 (emphasis added). Thus, the permissible restrictions are not limited to the law of nuisance. A restriction may be imposed under general nuisance law "*or otherwise*." *Id.*

Here, a prohibition of the Lonetree facility could have been duplicated by the State in July of 1991 under the general law of nuisance or "otherwise. " Existing land use statutes required a valid permit to construct and operate a large-scale solid waste disposal facility. Because SDDS did not have the necessary permits, the State could have blocked the operation and constriction of this facility under laws other than those of general nuisance. Although SDDS argues that it was not the failure of SDDS to obtain valid permits that caused the shut down of the Lonetree facility, that argument is immaterial under the first inquiry of *M & J Coal* and *Lucas*. Those cases provide that the reasons for the proscription are immaterial if the regulation at issue does "no more than duplicate the result" that could otherwise be achieved under other state law. *Lucas*, 505 US at ___, 112 Sct at 2900, 120 LEd2d at 821.

Second, even if existing "rules and understandings" are limited to the general laws of nuisance, the result of the Referendum could have been duplicated. SDCL 21-10-1 defines a nuisance as *unlawfully doing any act* which annoys others or renders others insecure in the use of their property. Clearly, the operation of Lonetree without the required permits would constitute an unlawful act. Furthermore, the operation of that facility without a permit could sustain a neighboring property owner's claim of annoyance or adverse impact on adjoining property. Under those circumstances, a private or public nuisance could be established by adjacent landowners or the State. South Dakota has long held that

conducting "unlicensed" activities may constitute a nuisance. *Town of Britton v. Guy*, 97 NW 1045, 1045 (SD 1904).

SDDS finally argues that even though its permits were found to be invalid and void by the courts, it still had statutory authority to develop the Lonetree facility under the provisions of SDCL 1-26-28. That statute allows a licensee (permit holder) to continue to exercise license (permit) rights until ten days after the final determination of the agency. *See* SDCL 1-26-28 and *Moulton v. State*, 412 NW2d 487, 495 (SD 1987). However, here the final determination of the agency granting both permits was reversed. Although the Board issued new findings on remand, it did not issue new permits. Because the permits were invalid and void from the beginning, SDDS had no existing permit, "license" or "right to continue the activity" under SDCL 1-2628.

*2. SDDS' application for a permit did not create a use interest which was compensable under the Fifth Amendment Takings Clause.*

SDDS contends that even if it had no permit, its permit application and its alleged compliance with all requirements necessary to obtain approval of the application created an "entitlement" to a permit. SDDS contends that such an entitlement is equivalent to a property right to construct and operate the facility. SDDS argues that the Referendum constituted a temporary taking of that "entitlement" because the Referendum extinguished any "rights [SDDS] had in any existing permit and any right it had to apply for another permit." *Response of SDDS to Defendant's Motion for Summary Judgment* at 16.

Two responses dispose of SDDS' argument. First, SDDS had no rights in existing permits to extinguish because SDDS' permits were invalid and void from their inception. Furthermore, the Referendum imposed no legal proscription on SDDS' ability to obtain a new permit on remand. SDDS was free to pursue new permits while it challenged the constitutionality of the Referendum. SDDS, however, *chose* not to pursue re-issuance of the permits even though it concedes there is no impediment to re-issuance. Therefore, *the Referendum* did not extinguish any rights in existing permits or the right to apply for another permit.

More importantly, even if there was a temporary restriction on the right to apply for a permit, SDDS' argument erroneously assumes that an *application* may create a property right which is protected by the Takings Clause of the Fifth Amendment. While this Court agrees that an interest in a permit *application* is entitled to *some* constitutional protection, the constitutional rights involved do not include the takings provision of the Fifth Amendment. The only Fifth Amendment protection afforded an interest in a permit *application* is the right. to due process. *Scott v. Greenville County*, 716 F2d 1409, 1421 (4thCir 1983).

The Due Process Clause of the Fifth Amendment guarantees that property rights cannot be taken without due process of law. *Brookpark Entertainment, Inc. v. Taft*, 951 F2d 710, 714 (6thCir 1991), cert denied, 113 SCt 68, 121 LEd2d 35 (1992). SDDS correctly notes that this right to *due process* may be extended to protect a permit application when "there is either a certainty or a very strong likelihood that the application would have been granted." *Southview Associates, Ltd. v. Bongartz*, 980 F2d 84, 101 (2dCir 1992) cert denied, 113 SCt 1586 (1983) (citation omitted). A due process claim of entitlement may also arise when an applicant has complied with all legal requirements. *Littlefield v. City of Afton*, 785 F2d 596, 602 (8thCir 1986). *See also Richardson v. Town of Eastover*, 922 F2d 1152, 1157 (4thCir 1991). *Bateson v. Geisse*. 857 F2d 1300, 1303 (9thCir 1988); *Cunningham v. City of Overland*, 804 F2d 1066, 1069 (8thCir 1986).

However, the fact that due process is afforded an interest in an application does not mean that such an interest is also protected by the Takings Clause.[9] On the contrary, different constitutional

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[9] The Court has reviewed the authorities cited by SDDS to support the assertion that the permit application should be afforded "takings" protection. While the cited authorities stand for the proposition that *due process* protection should be afforded SDDS with regard to their permit application, they do not hold that a permit application is entitled *takings* protection. Therefore, SDDS' due process authorities are not applicable to this takings claim. Because SDDS has not argued that they are entitled to compensation for any due process violation, this Court expresses no opinion on any potential due process claims.

protections are given to applications and permits. "While real property and other tangibles are commonly subject to "purchase" by the state as a means of compensation [under the takings clause], other forms of property interests--though constitutionally protected--are not normally so conceived. [The] entitlement to a permit is of the latter variety." *Scott*, 716 F2d at 1421 n20. Therefore, "[w]here a previously *valid* permit has issued and construction begun, a subsequent [legislative act] that effectively revokes permission to build is a confiscatory taking of the permit itself," which is protected by the takings clause. *Id.* 1421 (citing *Wheeler v. City of Pleasant Grove*, 664 F2d 99 (5th Cir 1981) cert denied, 456 US 973, 102 SCt 2236, 72 LEd2d 847 (1982) (emphasis added)). However, where a valid permit never actually existed, (the holding of *SDDS IV*), the *application* for the *permit*, even if entitled to protection by the Due Process Clause, "is not in the nature of interests the deprivation of which is encompassed by the Fifth Amendment 'takings' doctrine." *Scott*, 716 F2d at 1421. Unless the "non-issuance of the permit . . . effectively destroy[s] the value of the building site . . . no takings claim arises." *Id.* at 1421-22.

Here, SDDS alleges, like *Scott*, that the illegal regulatory obstacles created by the Referendum delayed the project and caused their "plan[s to] fall through, due to the pall cast over the project by the uncertainties of the state [action and] litigation." *Id.* at 1413. As a result, both *Scott* and SDDS alleged they were forced to sell their property at a loss. However, SDDS never obtained a valid permit, and the agricultural property SDDS purchased in 1988 can still be used for all uses available at the time of purchase. Because SDDS had no permit, and because SDDS has not established that the value of the Fall River County property was destroyed, SDDS' "entitlement under an application" is not a property interest which is protected by the Fifth Amendment Takings Clause. *Id.* at 1421.

SDDS also asks this Court to conclude that SDDS should not be required to obtain a permit because it would be a futile and unrequited formality which has no bearing on the. issue of whether SDDS holds a use interest compensable under the Fifth Amendment Takings Clause. SDDS relies upon *Whitney Benefits, Inc. v. United States*, 926 F2d 1169, 1172 (FedCir 1991), for the proposition that one need not apply for a permit if making an application would be "futile."

However, *Whitney* is factually distinguishable. Here, SDDS has conceded that because the Referendum was invalidated there is nothing now preventing approval of a permit to site, construct and operate the legislatively-approved facility. In answer to a question asked of SDDS by this Court, SDDS admitted, "[t]here is probably nothing, strictly speaking, that would prevent SDDS from obtaining the permit now." *Plaintiffs Reply Brief in Response to Defendants' Motion for Summary Judgment and in Support of SDDS' Cross-Motion for Summary Judgment* at 28.

The record also reflects that before the Referendum election, SDDS' permit application was remanded to the Board to determine whether the permit "should be reissued, and if so, what the effective date of the re-issuance should be." *In the Matter of Application of SDDS*, Civ. Case No. 92-364 (7thCirCt April 14, 1992). Although the Referendum did not restrict SDDS from pursuing the permits on remand, SDDS chose not to do so. Because SDDS chose not to pursue re-issuance of the permits, and because SDDS concedes there is no impediment to obtaining a permit, obtaining a permit would not be a "futile" act as it was in *Whitney*.

For these reasons, SDDS may not rely on *Whitney*. Furthermore, because SDDS never obtained a valid permit, SDDS did not expand its original property rights to include a use interest to site, construct and operate a solid waste disposal facility.

**II. There has been no "per se" compensatory taking of SDDS' property as a result of the Referendum.**

SDDS argues that it has suffered a "per se" compensable taking because the Eighth Circuit Court of Appeals held that the Referendum did not advance a legitimate state interest. *See Lonetree III*, 47 F3d at 272. SDDS contends that *Dolan v. City of Tigard*, 512 US __ , 114 SCt 2309, 129 LEd2d 304 (1994); *Lucas*, 505 US at __, 112 SCt at 2886, 120 LEd2d at 798 (1992); *Yee v. Escondido*, 503 US 519, 112 SCt 1522, 118 LEd2d 153 (1992); *Nollan v. California Coastal Comm'n*, 483 US 825, 107 SCt 3141, 97 LEd2d 677 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*. 480 US 470, 107 SCt 1232, 94 LEd2d 472 (1987); *Agins v. Tiburon*, 447 US 255, 100 SCt 2138, 65 LEd2d 106 (1980); and *Armstrong*, 346 US at 40, 80 Sct at 1563, 4 Led2d at 1554 establish that SDDS need not demonstrate the threshold

requirement of a property right to use the property as a solid waste disposal facility if the Referendum did not advance a legitimate state interest. SDDS also contends it need not demonstrate the threshold requirement if the Referendum denied SDDS all economically viable use of its land.

*A. Regulations which advance no legitimate state interest.*

The Eighth Circuit Court of Appeals, in the context of Commerce Clause analysis, concluded that the Referendum did not substantially advance any legitimate state interest. That conclusion does not, however, mean that a compensable "categorical taking" occurred under SDDS' cited cases.

First, as was previously discussed, takings are not automatically established under any circumstances unless the owner can first establish that the owner possessed a use interest to conduct the proscribed activity. *Lucas* specifically noted that even confiscatory regulations are not compensable if the regulations "inhere in the title itself [through the] background principles of the State's law of property and nuisance already in place upon land ownership." *Lucas*, 505 US at __, 112 SCt at 2900, 120 LEd2d at 821. Therefore, even though the Referendum had no legitimate state interest under the Commerce Clause, SDDS is not entitled to takings compensation because it cannot pass the threshold requirement that its property rights included the permissible use interest at issue. *See also M&J Coal*, 47 F3d at 1154.

Second, while SDDS' cited cases do indicate that a "per se" or "categorical" taking can occur under the *second inquiry* if the regulation advances no legitimate state interest, each of SDDS' cited cases involved an estate or use interest in property that was sufficiently vested to constitute an obvious property right protected by the takings clause. The threshold issue of whether the claimed use interest was protected by the takings clause was not at issue in those cases. Therefore, while this Court does not take issue with the law of "per se" *takings* (the second inquiry), SDDS' cited cases are not applicable because each clearly satisfied the threshold inquiry of establishing a vested property right which was protected by the takings clause.

SDDS also argues that a categorical taking occurred because it was deprived of all economically viable uses of its Fall River County property. Because SDDS has again failed to satisfy the threshold "property right" inquiry of takings law, this argument would ordinarily not be addressed. However, the argument is addressed because SDDS alleges that the Referendum deprived it of *all* economic use of the Fall River County property. If all economic use of property was eliminated, that type of restriction would, by definition, most likely proscribe *some* protected use interest.

*B. There was no deprivation of all economically viable use of SDDS' property.*

Regulations which prohibit all economically viable uses of property in the name of the common good are regulations which have gone too far and in the interest of justice and fairness require compensation. However, the "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Pennsylvania Coal Co. v. Mahon*, 260 US 393, 413, 43 SCt 158, 159, 67 LEd 322, 325 (1922). Nevertheless, when *no* productive or economically beneficial use of land is permitted, *Penn Central Transportation Co. v. New York City*, 438 US 104, 124, 98 SCt 2646, 2659, 57 LEd2d 631, 648 (1978), a regulatory taking has occurred. Those situations where the government has deprived a property owner of all economically viable uses of his property are, however, "relatively rare." *Lucas*, 505 US at 112 SCt at 2894, 120 LEd2d at 814. Furthermore, prohibition of the most beneficial use of property is permissible government action so long as all beneficial use of the property has not been prohibited. *Lucas*, 505 US at __, 112 SCt at 2894-95, 120 LEd2d at 814; *Penn Central Transportation Co.*, 438 US at 124, 98 SCt at 2659, 57 LEd2d at 648.

Here, SDDS argues that while the Referendum was in effect, it prohibited the use of the Fall River County property as a large-scale solid waste disposal facility. However, as was previously discussed, SDDS' permits were invalid and void *ab initio*. Therefore, SDDS could not have used its property for that economic purpose at the time the unconstitutional Referendum was in effect.

For the same reason, the Referendum could not have temporarily proscribed that economic use of the property.

Furthermore, even if the Referendum did temporarily prohibit SDDS from operating a large-scale solid waste facility, the Referendum did not prohibit any other economically viable use of the property. The Referendum also did not mandate that the Fall River County property be left in its natural state. *See Lucas*, 505 US at __, 112 SCt at 2895, 120 LEd2d at 814. Therefore, even if one assumes that the Referendum did prohibit the operation of the solid waste disposal facility approved by Senate Bill 169, the Referendum did not restrict or mandate any other uses. *See US West Communications*, 505 NW2d at 126-27.

Those other economic uses of the Fall River County property have substantial value. When SDDS purchased the property, the land had been used for grazing cattle. *Affidavit of Hunter Swanson* at 2. When SDDS sold the Fall River County property, the buyer purchased the land with the intent to use the land for grazing cattle. *Id.* at 7. Therefore, the temporary effect of the Referendum did not impact the property's use for agricultural purposes, its predominant use. In light of these undisputed facts, the temporary effect of the Referendum did not prohibit all economically viable uses of the Fall River County property.

**III. SDDS has not suffered a "per se" taking under *Whitney Benefits, Inc. v. United States*.**

SDDS finally alleges that it suffered a "per se" compensable taking because the Referendum was intended for the sole purpose of prohibiting a particular project. SDDS again relies on *Whitney Benefits*, 926 F2d at 1169, to support this argument. However, *Whitney Benefits* is factually distinguishable.

In *Whitney* the property owner acquired a vested mineral right to mine coal. The regulation at issue specifically referred to the Whitney coal property and prohibited the issuance of a permit to extract the coal, a *previously permissible* use. As the Federal Circuit Court noted:

> [T]he *only* property here involved is the right to surface mine a particular deposit of coal. The only possible use of that right is to surface mine that coal. When Congress prohibited mining

> of that coal, it did not merely regulate, it took, all the property involved in this case.

*Whitney Benefits, Inc.*, 926 F2d at 1172 (emphasis in the original).

Here, however, the regulation at issue merely interfered with legislative approval of one property use which was *not otherwise permissible*. Furthermore, the Referendum did not prohibit SDDS from obtaining the permits necessary to make its intended use permissible. SDDS was only temporarily prohibited from operating the proposed large-scale solid waste disposal facility under the design approved by Senate Bill 169. SDDS was free to seek re-issuance of its original permits or seek new permits for differently designed waste facilities. Moreover, the Referendum had no effect on the property's predominant use. Each of these circumstances distinguishes *Whitney*.

**IV. Even if SDDS had the required property interest, SDDS failed to affirmatively demonstrate that the Referendum was the cause of Lonetree's failure and SDDS' $5.6 million takings claim.**

SDDS claims a $5.6 million temporary taking as a result of the Referendum. SDDS alleges that the taking (its damages) occurred from July 1, 1991, the date Senate Bill 169 would have become effective, until February 6, 1995, the date the Eighth Circuit Court of Appeals declared the Referendum unconstitutional. While there is no dispute that the Referendum blocked *legislative approval* of Lonetree during that period, SDDS' general allegations in its affidavit do not meet its summary judgment burden of affirmatively showing that the Referendum proximately caused SDDS' abandonment of the project and its $5.6 million damages claim. *See Home Fed. Sav. & Loan v First Nat'l Bank*, 405 NW2d 655, 658 (1987) (holding a general assertion of allegations essential to establishing a case is insufficient and conclusory); SDCL 15-6-56(e).

To recover under a takings claim, SDDS must show a serious financial loss *as a result of* the economic impact of the Referendum. Although SDDS initially alleged that a $100 million taking occurred due to the combined effect of the Initiative and the Referendum, SDDS now seeks $5.6 million as a taking due to the temporary

effect of the Referendum alone. However, in its brief to this Court, SDDS stated 'the initiated measure halted the development of Lonetree. . . ." *Plaintiff's Reply Brief in Response to Defendant's Motion for Summary Judgment and in Support of SDDS' Cross-Motion for Summary Judgment* at 2. *See also* SDCL 34A-6-55. Although SDDS alleges that the *Initiative* halted development of Lonetree, SDDS alleges also that the taking occurred at a later time when the Referendum was in effect.

This inconsistency is significant because there is no dispute that the Referendum only temporarily blocked *legislative approval* of the project. However, even if SDDS had unrestricted legislative approval, it had no permit and therefore no right to operate while the Referendum was in effect. Furthermore, there was no impediment to obtaining the necessary permits. Under these circumstances, SDDS' conclusory affidavit does not demonstrate, for purposes of summary judgment, that the temporary *effect of the Referendum* caused the loss of its $5.6 million development costs. Therefore, SDDS has not carried their summary judgment burden of showing that a $5.6 million taking occurred *as a result of the temporary effect of the Referendum.* SDCL 15-6-56(e).

## CONCLUSION

Without a valid permit, SDDS never obtained a use interest to site, construct and operate a large-scale solid waste disposal facility under the law, rules and understandings in existence at the time it owned the property. Because SDDS never obtained a use interest to operate a large scale solid waste disposal facility, SDDS was not deprived of any "property" protected by the Fifth Amendment's Takings Clause. Furthermore, because the Lonetree facility was effectively shut down before the Referendum was filed, and because the Referendum was no impediment to obtaining the necessary permits, SDDS has failed to demonstrate that the temporary effect of the Referendum was the cause of its $5.6 million takings claim. For these reasons, SDDS has not demonstrated that as a matter of law, it suffered a $5.6 million taking as a result of the temporary effect of the Referendum. Summary judgment is granted for the State.

Dated this 17th day of January, 1996.

BY THE COURT:

_____
Steven L. Zinter
Circuit Court Judge

ATTEST:

_____
Clerk of Courts
By _____
Deputy
(SEAL)
CC: Counsel of Record

## APPENDIX C

**In re SDDS, INC., a South Dakota Corporation,**
**Petitioner.**

**No. 96-2705.**

United States Court of Appeals,

Eighth Circuit.

Submitted Aug. 26, 1996.

Decided Oct. 3, 1996.

Developer moved to enjoin state and various state officials from relitigating in state courts issues which had allegedly been previously decided by the Court of Appeals. The United States District Court denied that motion, and developer petitioned for writ of mandamus, seeking that district court be directed to issue injunction. The Court of Appeals, Magill, Circuit Judge, held that: (1) mandamus petition would be construed as notice of appeal; (2) Eleventh Amendment does not bar suit in federal court for injunctive relief to prohibit state defendant from relitigating state court issues previously decided in federal court; (3) relitigation exception to Anti-Injunction Act permitted injunctive relief; and (4) denial of injunctive relief was abuse of discretion.

Reversed and remanded with directions.

Edward T. Lyons, Jr., argued, David E. Driggers and Thomas J. Burke, Jr., Denver, CO, for appellant.

Diane M. Best, argued, Pierre, SD, for appellee.

Before MAGILL, JOHN R. GIBSON, and BEAM, Circuit Judges.

MAGILL, Circuit Judge.

South Dakota Disposal Systems, Inc. (SDDS) moved the district court to enjoin the State of South Dakota and various state officials in their official capacities, including Mark W. Barnett, Attorney General of the State of South Dakota, Walter D. Miller, Governor of the State of South Dakota, and Joyce Hazeltine, Secretary of the State of South Dakota (Defendants) from

relitigating in the South Dakota state courts certain issues previously decided by this Court. The district court denied this motion, and SDDS now petitions this Court for a writ of mandamus, directing the district court to issue the injunction. Defendants object, arguing that this relief is improper under both the Eleventh Amendment and the Anti-Injunction Act, 28 U.S.C. § 2283. We disagree, and conclude that injunctive relief is proper in the circumstances of this case. Construing SDDS's petition as an appeal of the district court's denial of injunctive relief, we reverse.

## I.

On the last occasion during which these parties were before us, we stated that it was "the latest in a seemingly never-ending series of cases arising from SDDS's six-year-long struggle to develop a large-scale [multistate solid waste disposal, or MSWD] facility near Edgemont, South Dakota." *SDDS, Inc.* v. *State of S.D.*, 47 F.3d 263, 265 (8th Cir.1995) (*SDDS VI*). This description was unfortunately prescient; one-and-a-half years after penning those words, litigation continues in both state and federal courts concerning SDDS's efforts to construct and operate the MSWD facility. In this latest incarnation of the case, we are called upon to determine if the Defendants are attempting to relitigate issues decided previously by this Court and, if so, whether the Defendants should be enjoined from attempting such relitigation.

The facts of this case have been stated and restated by a variety of courts; see *SDDS VI*, 47 F.3d at 265-67; *SDDS, Inc.* v. *State of S.D.*, 994 F.2d 486, 488-91 (8th Cir.1993) (*SDDS III*); *SDDS, Inc.* v. *State of S.D.*, 843 F.Supp. 546, 548-52 (D.S.D.1994) (*SDDS V*), rev'd, *SDDS VI*, 47 F.3d at 265; *Matter of 1990 Renewal Application of SDDS*, 507 N.W.2d 702, 702-03 (S.D. 1993) (*SDDS IV*); *SDDS, Inc.* v. *State*, 481 N.W.2d 270, 271- 72 (S.D. 1992) (*SDDS II*); *Matter of SDDS, Inc.*, 472 N.W.2d 502, 504-06 (S.D. 1991) (*SDDS I*); *SDDS, Inc.* v. *State of S.D.*, Civil Case No. 93-324 (S.D. 6th Jud. Cir.Ct. Jan. 17, 1996) (*SDDS VII*),[1] and only a brief summary need be provided here. SDDS purchased land in Fall River County, South Dakota, in 1988, with the intention of

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[1] This is, of course, not a complete list of prior judicial recitations of the facts of this case.

constructing the "Lonetree" facility, an MSWD site. In 1989, SDDS was successful in obtaining from the South Dakota Board of Minerals and Environment (Board) a one-year permit to site, construct, and operate the MSWD facility. In 1990, the Board granted SDDS a five-year renewal of its permit. Both permits were challenged in South Dakota state courts.[2] In *SDDS I*, the South Dakota Supreme Court ruled that the one-year permit was invalid because the Board had made insufficient findings of fact. See id., 472 N.W.2d at 513. In *SDDS IV*, the South Dakota Supreme Court held that, because the one-year permit had been declared invalid, the five-year renewal was void ab initio. See *id.*, 507 N.W.2d at 704. In 1991, on remand after *SDDS I*, the Board made the required specified findings that the proposed MSWD facility was environmentally safe and was in the public interest. See *SDDS VI*, 47 F.3d at 265 n. 5 (detailing subsequent administrative history).[3]

During the course of the litigation over the Board's initial grant of permits to SDDS, the South Dakota electorate decided two ballot initiatives. The first, Initiative Measure No. 1, was approved in 1990, and required legislative approval of large-scale solid waste disposal sites. SDDS unsuccessfully challenged Initiative Measure No. 1 in the South Dakota trial court, see *SDDS, Inc.* v. *State of S.D.*, Civil Case No. 90-412 (S.D. 6th Cir.Ct. Oct. 31, 1991), and did not appeal to the South Dakota Supreme Court. The South

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[2] Under South Dakota law, an aggrieved party may appeal an adverse administrative decision to the state courts. See SDCL 1-26-30. "'A final determination of an agency decision is reached when the reviewing court, after deciding the correctness of the matter on review, affirms the decision or remands it to the agency for reconsideration and a decision in accord with that court's directive.'" *Matter of Exploration Permit Renewal, Etc.*, 323 N.W.2d 858, 860 (S.D. 1982) (quoting *Matter of Silver King Mines*, Permit EX-5, 315 N.W.2d, 689, 693 (S.D. 1982) (Morgan, J., dissenting)).

[3] It does not appear that any South Dakota state court has addressed the merits of the Board's 1991 findings that the MSWD facility was environmentally safe and in the public interest. Rather, upon judicial review, the case was remanded to the Board "for the opportunity to reissue Original Permit" because the original permits had been invalidated. See Br. in Support of Resp't's Answer at 4. SDDS never received reissued permits.

Dakota legislature approved SDDS's MSWD site by passing 1991 Senate Bill 169. This bill was signed by the South Dakota governor, and was to take effect on July 1, 1991. *See SDDS II*, 481 N.W.2d at 272 (determining effective date of 1991 Senate Bill 169).

The other ballot initiative decided by the South Dakota electorate was a referendum on Senate Bill 169, requiring voter approval of SDDS's MSWD site. See *SDDS VI*, 47 F.3d at 266. The electorate vetoed the MSWD facility, which "shut down" SDDS's completion of the Lonetree site. See *SDDS IV*, 507 N.W.2d at 703.[4] SDDS challenged the referendum measure in federal court, arguing that it offended the dormant commerce clause. We reversed the district court's grant of summary judgment to the defendants twice, first holding that the unsuccessful challenge to Initiative Measure No. 1 in the South Dakota trial court did not act to collaterally estop the challenge to the referendum, see *SDDS III*, 994 F.2d at 494, and later holding that the referendum violated the dormant commerce clause. See *SDDS VI*, 47 F.3d at 272 (reversing *SDDS V*).

During the course of this wide ranging litigation, SDDS never opened its proposed MSWD site. In 1994, it sold the land planned for the development of the MSWD and went out of business. SDDS brought suit against the Defendants in South Dakota state court to recover just compensation for an alleged uncompensated "taking" of its property by the Defendants through the unconstitutional referendum, in violation of the Fifth and Fourteenth Amendments. The South Dakota state trial court granted summary judgment to the Defendants, holding that SDDS had no property right in operating an MSWD site, and that the referendum was not a proximate cause of SDDS's losses. See *SDDS VII*, Mem. Op. at 11, 18, 24-25. The appeal of *SDDS VII* is pending before the South Dakota Supreme Court.

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[4] At the time the referendum was decided by the South Dakota voters, SDDS was still operating under its five-year renewal permit. It was several years after the referendum placed "Senate Bill 169 in limbo," *SDDS IV*, 507 N.W.2d at 703, long after SDDS incurred its alleged injuries, that the South Dakota Supreme Court declared SDDS's five-year renewal permit "void ab initio." *Id.* at 704.

Contending that the Defendants were attempting to relitigate issues decided by this Court in *SDDS VI*, SDDS sought an injunction in the federal district court against the Defendants. The district court summarily denied injunctive relief,[5] and SDDS now petitions this Court for a writ of mandamus. SDDS requests that we require the district court to issue an injunction against the Defendants, forbidding them from relitigating in the South Dakota state courts the issues of (1) whether SDDS had a legitimate claim of entitlement to a permit to operate an MSWD, and (2) whether the referendum was the proximate cause of SDDS's dissolution. The Defendants object to the issuance of the writ, arguing that the standards for a writ of mandamus have not been satisfied, that the Eleventh Amendment prohibits this suit, that the Anti- Injunction Act forbids issuance of the writ, and that injunctive relief is not warranted by the facts of the case. We address each of these arguments in turn.

**II.**

The issuance of a writ of mandamus "is a drastic remedy to be invoked only in extraordinary situations," *Melahn* v. *Pennock Ins., Inc.*, 965 F.2d 1497, 1501 (8th Cir.1992) (quotations omitted), and may issue "only if a petitioner is able to establish a clear and indisputable right to the relief sought, the defendant has a nondiscretionary duty to honor that right, and the petitioner has no other adequate alternative administrative or judicial remedy." *In re Lane*, 801 F.2d 1040, 1042 (8th Cir.1986) (quotations and citations omitted). The Defendants argue that a writ of mandamus is inappropriate to require a district court to issue an injunction,

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[5] The district court stated: On April 11, 1996, SDDS filed a motion for the issuance of an order to show cause, for a speedy hearing, and for a preliminary and a permanent injunction pursuant to the Declaratory Judgments Act and the All Writs Act. The state defendants responded on May 6, 1996. SDDS filed a reply on May 23, 1996. Essentially, SDDS's claim for injunctive relief seeks to have this Court enjoin a proceeding before the South Dakota Supreme Court. This Court declines to take such action. Accordingly, having considered the matter, it is hereby ORDERED that SDDS's motion for an order to show cause and for injunctive relief (Docket # 133) is denied. *SDDS, Inc.* v. *State of S.D.*, Civil No. 91-5121 (D.S.D. May 28, 1996), reprinted in I Appellant's App. at Tab 12.

because such relief is left to the discretion of the district court. See *id.* ("Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is clear and indisputable." (quotations and citations omitted)).

We need not reach the question of whether a writ of mandamus may issue to correct a district court's abuse of discretion in denying injunctive relief. A denial of an injunction is an immediately appealable interlocutory order, see 28 U.S.C. § 1292(a)(1). Where the liberal standards for notice of appeal have been met in a case, a petition for a writ of mandamus may be construed as a notice of appeal from an immediately appealable order by a district court. See *United States* v. *Gundersen*, 978 F.2d 580, 583-84 (10th Cir.1992) (construing petition for mandamus as notice of appeal, and citing cases); *United States* v. *Green*, 499 F.2d 538, 540 n. 5 (D.C. Cir.1974) (per curiam) (citing cases). Here, SDDS's petition for mandamus "was the functional equivalent of a notice of appeal [because] it fulfilled [Fed. R. App. P.] 3's requirements concerning notice," *Gundersen*, 978 F.2d at 583 (analyzing *Smith* v. *Barry*, 502 U.S. 244, 112 S.Ct. 678, 116 L.Ed.2d 678 (1992)). SDDS's petition specified the party taking the appeal, designated the district court order appealed from, and named the court to which the appeal was taken. See *id.*; see also Fed. R. App. P. 3(c). In all of the circumstances of this case, therefore, we believe it is appropriate to construe SDDS's petition for a writ of mandamus as a notice of appeal.

**III.**

The Eleventh Amendment generally bars suits brought against the states in federal courts. While the specific language of the Eleventh Amendment refers only to "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," U.S. Const. amend. XI,

> we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition which it confirms. That presupposition, first observed over a century ago in *Hans* v. *Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that it is inherent in

> the nature of sovereignty not to be amenable to the suit of an individual without its consent. For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States.

*Seminole Tribe of Fla.* v. *Florida*, --- U.S. ----, ----, 116 S.Ct. 1114, 1122, 134 L.Ed.2d 252 (1996) (citations and quotations omitted). The immunity recognized by the Eleventh Amendment extends to both suits for monetary damages and those for declaratory or injunctive relief; "The Eleventh Amendment does not exist solely in order to prevent federal court judgments that must be paid out of a State's treasury; it also serves to avoid the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Id.* at ----, 116 S.Ct. at 1124. South Dakota and its state officials sued in their official capacities would, therefore, normally be immune from suit in the federal courts.

*In Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), however, the Supreme Court established a fundamental exception to the Eleventh Amendment's immunity doctrine:

> *Ex parte Young* recognized that suits may be brought in federal court against state officials in their official capacities for prospective injunctive relief to prevent future violations of federal law. The doctrine of *Ex parte Young* is based on the idea that the power of federal courts to enjoin continuing violations of federal law is necessary to vindicate the federal interest in assuring the supremacy of that law.

*Fond du Lac Band of Chippewa Indians* v. *Carlson*, 68 F.3d 253, 255 (8th Cir.1995) (quotations and citations omitted). See also *Denke* v. *South Dakota Dep't of Social Servs.*, 829 F.2d 688, 689 (8th Cir.1987) ("Eleventh amendment analysis is an area dominated by formalistic rules, often neither intuitive nor strictly rational. However, over years of development, important exceptions to state immunity from suit have been recognized which allow citizens to vindicate rights infringed upon by state authorities. Extremely important in this regard is the substantial exception to the scope of the eleventh amendment represented by the case of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)[,] and its progeny.").

Defendants did not contend that *SDDS VI* was improperly heard by this Court in violation of the Eleventh Amendment, and we do not believe that any such argument could have been successful. As a suit for prospective declaratory relief from South Dakota's ongoing violation of the dormant commerce clause, the Defendants could not have enjoyed immunity under the Eleventh Amendment in *SDDS VI*. See *Ex parte Young*, 209 U.S. at 159, 28 S.Ct. at 454 ("the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity").

The question presented is therefore whether the Defendants, who had been properly sued for declaratory relief in a prior suit, can now assert Eleventh Amendment immunity from this suit for prospective injunctive relief which seeks only to effectuate our earlier judgment. An affirmative answer would allow these Defendants, and all future state defendants, to effectively ignore judgments rendered in the federal courts, generating needless relitigation in the state courts, and rendering our judgments largely nugatory and advisory.[6] This is an intolerable result, and one which

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[6] Indeed, it is clear that this is precisely what the Defendants in this case have attempted to do to our judgment in *SDDS VI* almost from the moment the decision was filed. Upon our remand of the case to the district court for a determination of attorney's fees, the Defendants stated:

> All that has been obtained for the Plaintiff [in *SDDS VI*], however, is a declaratory judgment that the referendum was unconstitutional. The court of appeals let stand this court's important rulings on the due process and equal protection issues raised by Plaintiffs.
>
> Plaintiff has, in essence, obtained a judgment which can do it no good. [FN2 In its response to Defendants' submission on the "prevailing party" issue, Plaintiff claims in a footnote that the ruling of the court of appeals may have some application in the state "inverse condemnation" case, but Plaintiff does not explain how the court of appeals ruling on the commerce clause issue can have any application to the inverse condemnation case. Additionally, it is important to note that the state courts could agree with this court[']s ruling (which the court of appeals let stand) that Plaintiff had no property interest which could be unlawfully taken.] Plaintiff has in

is not, we believe, mandated by the Eleventh Amendment. We therefore hold that the Eleventh Amendment does not bar a suit in the federal court for injunctive relief to prohibit a state defendant

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> fact accomplished nothing more than obtaining "the moral satisfaction of knowing that a federal court concluded [its] rights had been violated...." *Farrar* vs. *Hobbey* [*Hobby*, 506 U.S. 103, 114, 113 S.Ct. 566, 574, 121 L.Ed.2d 494] (1992), quoting *Hewitt* v. *Helms*, 482 [U.S.] 755, 762 [107 S.Ct. 2672, 2676, 96 L.Ed.2d 654] (1987). In these circumstances, a substantial reduction in the amount awarded, or [no] award at all, see *Farrar*, 506 U.S. at 115 [113 S.Ct. at 575], is appropriate.

Resp. to Mot. to Determine Award of Att'ys' Fees & Costs & Req. for Hr'g at 13-14, reprinted in I Appellant's App. at Tab 7 (ellipses in original). Contrary to the Defendants' mischaracterizations of *SDDS VI*, we did not "let stand" any portion of the district court decision in *SDDS V*; rather, we reversed the district court, an remanded the case to the district court "with instructions to enter judgment in favor of SDDS." *SDDS VI*, 47 F.3d at 272.

Similarly, in opposing SDDS's requested injunctive relief in the district court, the Defendants urged the district court to disregard our decision in *SDDS VI* by stating that:

> SDDS also argues that the Eighth Circuit decision is binding precedent on the state courts. While the United States Supreme Court has the authority to enter decisions binding on the South Dakota Supreme Court, the lower federal courts do not have such power.

State Defs.' Br. In Supp. of Resistance to Pl.'s Mot. for Order to Show Cause & for Speedy Hr'g & for Prelim. & Permanent Inj. at 14, reprinted in I Appellant's App. at Tab 10. Contrary to the Defendants' rather unique interpretation of federalism, the judgments of this Court are, in fact, entitled to the same res judicata and collateral estoppel effect in the South Dakota state courts as judgments rendered by those courts. See, e.g., *City of Tacoma* v. *Tacoma Taxpayers*, 357 U.S. 320, 334, 78 S.Ct. 1209, 1217-18, 2 L.Ed.2d 1345 (1958).

from relitigating in a state court issues previously decided in a federal court.[7]

## IV.

Embodying fundamental precepts of federalism and comity between federal and state courts, the Anti-Injunction Act provides that: A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. 28 U.S.C. § 2283.[8] The

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[7] The Defendants, citing *Green* v. *Mansour*, 474 U.S. 64, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985), argue that the instant suit for injunctive relief is in fact a "demand that this Court direct the South Dakota courts to grant SDDS a monetary award to be paid from the South Dakota state treasury." Br. In Supp. of Resp't's Answer at 13. We disagree. Green was an action for declaratory relief for an alleged past violation of constitutional rights; "the award of a declaratory judgment in this situation would be useful in resolving the dispute over the past lawfulness of respondent's action only if it might be offered in state-court proceedings as res judicata on the issue of liability, leaving to the state courts only a form of accounting proceeding whereby damages or restitution would be computed." *Green*, 474 U.S. at 73, 106 S.Ct. at 428. By contrast, the suit before us has been brought to effectuate our judgment in *SDDS VI*, a "[r]emed[y] designed to end a continuing violation of federal law [which was] necessary to vindicate the federal interest in assuring the supremacy of that law." *Id.* at 68, 106 S.Ct. at 426.

[8] In *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 146, 108 S.Ct. 1684, 1689, 100 L.Ed.2d 127 (1988), the Supreme Court explained the purpose of the Anti-Injunction Act:

> The Act, which has existed in some form since 1793, see Act of Mar. 2, 1793, ch. 22, § 5, 1 Stat. 335, is a necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts. It represents Congress' considered judgment as to how to balance the tensions inherent in such a system. Prevention of frequent federal court intervention is important to make the dual system work effectively. By generally barring such intervention, the Act forestalls the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court. Due in no small part

Supreme Court has "expressly rejected the view that the anti-injunction statute merely states a flexible doctrine of comity, and [has] made clear that the statute imposes an absolute ban upon the issuance of a federal injunction against a pending state court proceeding, in the absence of one of the recognized exceptions...." *Mitchum* v. *Foster*, 407 U.S. 225, 228-29, 92 S.Ct. 2151, 2155, 32 L.Ed.2d 705 (1972) (citing *Atlantic Coast Line R.R.* v. *Locomotive Eng'rs*, 398 U.S. 281, 286-87, 90 S.Ct. 1739, 1743, 26 L.Ed.2d 234 (1970) (note omitted)).

Included in the Anti-Injunction Act are specific, enumerated exceptions. These exceptions, which "are designed to ensure the effectiveness and supremacy of federal law," *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 146, 108 S.Ct. 1684, 1689, 100 L.Ed.2d 127 (1988), include the relitigation exception. This exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of res judicata and collateral estoppel. *Id.* at 147, 108 S.Ct. at 1690. See also *NBA* v. *Minnesota Pro. Basketball, Ltd. Partnership*, 56 F.3d 866, 871 (8th Cir.1995) ("The legislative policy that permits a federal court to enjoin state court action when a federal court has decided a suit on its substantive merits has equal force when a critical underlying issue unrelated to the substantive merits of the action has been litigated to finality." (quotations and citations omitted)). As with all of the statutory exceptions, the relitigation exception is "narrow and [is] not to be enlarged by loose statutory construction." *Chick Kam Choo*, 486 U.S. at 146, 108 S.Ct. at 1689 (quotations and citations omitted).

We review de novo the applicability of the relitigation exception. See *NBA*, 56 F.3d at 871. In order to enjoin a state

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> to the fundamental constitutional independence of the States, Congress adopted a general policy under which state proceedings should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately [the United States Supreme Court].

(quotations and citations omitted).

court from relitigating an issue, the issue must "actually have been decided by the federal court." *Chick Kam Choo*, 486 U.S. at 148, 108 S.Ct. at 1690. To determine if this strict and narrow prerequisite has been met, we must assess "the precise state of the record and what the earlier federal order actually said; [we may not] render a post hoc judgment as to what the order was intended to say." Id. (citing *Atlantic Coast*, 398 U.S. at 290, 90 S.Ct. at 1744-45 (emphasis in original)).

In an extended discussion, the district court in *SDDS V* held that SDDS had no protected property interest in operating an MSWD facility, and that the referendum had no effect on SDDS's ability to operate an MSWD. The district court stated:

> Under South Dakota law, SDDS needs two things in order to operate its Lonetree facility: (1) a valid permit and (2) legislative approval from the South Dakota Legislature. See SDCL 34A-6-1.4 to 34A-6-1.13 (solid waste disposal facilities must obtain permits); and SDCL 34A-6-53 to 34A-6-56 (solid waste disposal facilities handling in excess of 200,000 tons of waste annually must get legislative approval for their operations).
>
> At the time of the Referendum in November 1992, SDDS's one-year permit had expired. In any event, that one-year permit was void because the [Board], in issuing the permit, failed to make specific findings of fact that the Lonetree facility was in the public interest and that the facility met five specified environmental prerequisites.
>
> Although the [Board] had issued SDDS a five-year renewal permit and the Legislature had passed S.B. 169 approving the operation of the Lonetree facility, the five-year permit was invalid because it was based upon an invalid one-year permit. The five-year renewal permit was void ab initio. In other words, SDDS has never had a valid permit to operate the Lonetree facility. Without a valid permit, SDDS has no constitutionally protected property interest in operating the facility. Both of SDDS's due process claims fail.
>
> The Court notes that SDDS's remaining commerce clause and equal protection claims rest solely on the effect of the

> Referendum, the validity of the Initiated Measure having already been decided by [the South Dakota state court]. Furthermore, because SDDS has never had a valid permit to operate its Lonetree facility, S.B. 169 and the subsequent Referendum "vetoing" that bill have no practical effect. By the very unambiguous terms of the Initiated Measure, legislative approval may only be granted to a facility that is operational "pursuant to solid waste permit." SDCL 34A-6-53. SDDS has never had a valid permit. The legislature cannot have granted approval of the Lonetree facility if the facility had no permit to operate. It logically follows that if the legislature was not in a position to grant approval to the Lonetree facility, then the enabling legislation (S.B. 169) was of no effect. The Referendum would also be of no effect. If the Referendum had no effect, the commerce clause and the equal protection clause are not implicated.

*SDDS V*, 843 F.Supp. at 553-54 (citations and notations omitted).

The Defendants, in their brief to this Court in *SDDS VI*, argued strenuously that we affirm these holdings. See Appellee's Br. in No. 94-1688, at 10-17, 41, reprinted in part in 1 Appellant's App. at Tab 2.[9] SDDS, of course, strongly urged that we reverse

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[9] For example, the Defendants previously argued that South Dakota's

> laws regulating solid waste facilities have changed since SDDS obtained its original 1989 permit. South Dakota's solid waste regulations were entirely rewritten in July of 1990, and have been amended once before the November 1992 Referendum and once after. Appellee's Appendix G. Since the September 1991 findings issued by the Board were based on the original 1989 record, the September 1991 findings do not address or consider these regulatory changes. The Board must determine compliance with these new regulatory requirements before a solid waste permit can issue; this determination was never made and SDDS is therefore not entitled to a permit.

Appellee's Br. in No. 94-1688, at 14-15, reprinted in 1 Appellant's App. at Tab 2. See also id. at 41 ("More importantly the Referendum's disapproval of Senate Bill 169 did not impact SDDS's ability to accept out of state waste because SDDS could not accept any waste, regardless of the source, until it obtained new state solid waste permits." (emphasis in

the district court on these points. See Appellant's Reply Br. in No. 94-1688, at 2-10, reprinted in I Appellant's App. at Tab 3.[10]

In *SDDS VI*, we reversed the district court's judgment. See 47 F.3d at 272. In so doing, we explicitly accepted SDDS's arguments on both of these contested issues, and we explicitly rejected the Defendants' positions. Regarding the protected property interest in operating the MSWD, we stated:

> In 1991, S.D. Codified Laws § 34A-6-1.13 was amended and the implementing regulations were rewritten. Although the ultimate question of whether the facility was environmentally safe and in the public interest remained the same, several factors weighing into the agency's decision changed. On remand after *SDDS I*, the agency made the specific findings required by its revised regulations. *The agency found the Lonetree facility to be environmentally safe, using language that parallels the applicable regulation.* Appellant's App. at 117 (Finding # 52, paralleling S.D. Admin. R. 74:27:17:01). *The agency found the facility to be in the public interest.* Appellant's App. at 121 (Finding # 72). Both findings were preceded by numerous supporting factual findings. *The revised [Board] findings also contain a specific legal*

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original)).

[10] For example, SDDS previously argued that

> the procedural defect in the [Board's] original decision--the lack of findings that resulted in the remand in *SDDS I*--had been cured by the time of the Referendum.... [O]n remand the [Board] entered extensive findings responsive to the [South Dakota] Supreme Court's mandate and concluded that SDDS had met "all requirements" for the issuance of a solid waste permit under the relevant laws and regulations of South Dakota.

Appellant's Reply Br. in No. 94-1688, at 7, reprinted in Appellant's App. at Tab 3 (note omitted). See also id. at 3 ("[t]he State attempts to avoid the consequence of its admission concerning the Referendum's 'practical effect,' by engaging in an inventive but, unfortunately, distorted analysis of the state court litigation").

> *conclusion that all requirements for the permit had been met.* Appellant's App. at 122 (Conclusions of law # 3 & # 4).

*SDDS VI*, 47 F.3d at 265 n. 5 (emphasis added).[11] This determination that all of the factual predicates and legal requirements for SDDS's permit had been met was necessarily dispositive of SDDS's property interest in the permit itself. See *Littlefield* v. *City of Afton*, 785 F.2d 596, 602 (8th Cir.1986) ("We hold that appellants have a property interest in the building permit because they complied with all the *legal* requirements contained in the ordinances of the City of Afton. Appellants need not comply with illegal conditions in order to have a property interest in the permit." (emphasis in original)), holding limited in part on other grounds, *Lemke* v. *Cass County, Neb.*, 846 F.2d 469, 470-71 (8th Cir.1987) (per curiam) (en banc) (holding that "[w]hether a substantive due process claim may arise from a denial of a zoning permit is an open question in this circuit and need not be decided in this case").[12]

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[11] We note that these factual determinations by an administrative agency must be given "great weight" by South Dakota courts. See SDCL 1-26-36.

[12] In adopting the factual findings of the Board in *SDDS VI*, we did not then--and need not now--address the issue of whether those findings were entitled to claim preclusive effect. See *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 109-10, 111 S.Ct. 2166, 2170, 115 L.Ed.2d 96 (1991) ("Although administrative estoppel is favored as a matter of general policy, its suitability may vary according to the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedures."). Put bluntly, here we are not concerned with determining the accuracy of our decision in *SDDS VI*, but rather in insuring its effectiveness. See, e.g., *Moe* v. *Moe*, 496 N.W.2d 593, 595 (S.D. 1993) (res judicata applies "whether the court was correct at the time or not"). If the Defendants were dissatisfied with our adjudication of their case in *SDDS VI*, their options were to request rehearing by this Court en banc or to petition the United States Supreme Court for a writ of certiorari. They may not, however, collaterally challenge our decisions in the South Dakota state courts. See *City of Tacoma*, 357 U.S. at 334, 78 S.Ct. at 1217-18.

Regarding the effect of the referendum on SDDS, we stated in *SDDS VI* that:

> Despite the fact that it has previously conceded that "[t]he practical effect of the referendum was to prohibit the construction" of the Lonetree facility, Appellant's App. at 39, South Dakota now argues that because the [Board] permit had been revoked, the referendum had no impact, discriminatory or otherwise, on Lonetree. However, if this court were to ignore South Dakota's intermediary actions and look only to the result, it would reward South Dakota for acting unconstitutionally. Moreover, the administrative permit was voided due to a procedural defect, not because of any finding that the Lonetree facility was environmentally dangerous. Thus, Lonetree could reapply for the administrative permit, and the referendum at the very least made the Lonetree project more difficult and expensive to accomplish.

*Id.* at 270 n. 10 (citations and quotations omitted).[13]

The issues which the Defendants now wish to relitigate in the state courts were, therefore, actually and finally decided by this Court in *SDDS VI*. Under South Dakota's rules of claim preclusion or collateral estoppel, we conclude that this Court's decision in *SDDS VI* bars the Defendants from relitigating these settled issues in subsequent litigation in the state courts. See, e.g., *Moe* v. *Moe*, 496 N.W.2d 593, 595 (S.D. 1993):

> [I]f the prior final judgment or order had been rendered by a court of competent jurisdiction, it is conclusive as to all rights, questions, or facts directly involved and actually, or by necessary implication, determined therein, whether the court was correct at the time or not.

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[13] Indeed, our ruling echoed that of the South Dakota Supreme Court in *SDDS IV*, 507 N.W.2d at 703, which found that the referendum "placed Senate Bill 169 in limbo and shut down the [Lonetree] facility pending the outcome of the general election." See also *SDDS III*, 994 F.2d at 489 ("S.B. 169 was, therefore, effectively vetoed by the citizens of South Dakota and the Lonetree project has been unable to proceed since.").

> We apply four factors to determine whether the doctrine of [claim preclusion] bars this appeal: (1) whether the issue decided in the former adjudication is identical with the present issue; (2) whether there was a final judgment on the merits; (3) whether the parties are identical; and (4) whether there was a full and fair opportunity to litigate the issues in the prior adjudication.

(citations and quotations omitted). See also *Black Hills Novelty Co.* v. *South Dakota Comm'n*, 520 N.W.2d 70, 73 (S.D. 1994) (describing elements of collateral estoppel). In this case, all of these elements have unquestionably been met: the issues are the same, the parties are the same, there was a final judgment on the merits in *SDDS VI*, and the record amply reveals that the Defendants were not only given, but took every opportunity, to fully and fairly litigate these issues before us. Because the Defendants are barred by claim preclusion from relitigating the issues of (1) whether SDDS had a legitimate claim of entitlement to a permit to operate an MSWD, and (2) whether the referendum was the proximate cause of SDDS's dissolution, the relitigation exception to the Anti-Injunction Act permits injunctive relief to prevent them from so relitigating these issues in the South Dakota state courts.[14]

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[14] Under the Full Faith and Credit Act, 28 U.S.C. § 1738, we are bound by a state court's application of its res judicata rules to our judgments. See *Parsons Steel, Inc.* v. *First Ala. Bank*, 474 U.S. 518, 524, 106 S.Ct. 768, 772, 88 L.Ed.2d 877 (1986):

> We believe that the Anti-Injunction Act and the Full Faith and Credit Act can be construed consistently, simply by limiting the relitigation exception of the Anti-Injunction Act to those situations in which the state court has not yet ruled on the merits of the res judicata issue. Once the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision.

Because the South Dakota trial court did not rule on the claim preclusive effect of *SDDS VI*, see *SDDS VII*, Mem. Op. at 2 n. 3, 5, 20-21, we are not precluded from protecting our judgment in *SDDS VI* under the relitigation exception to the Anti-Injunction Act. See *Daewoo Elecs.* v. *Western Auto Supply Co.*, 975 F.2d 474, 479 (8th Cir.1992).

## V.

We recognize, however, that "[t]he fact that an injunction may issue under the Anti-Injunction Act does not mean that it must issue. The injunction must be an otherwise proper exercise of the [court's] equitable power." *Daewoo Elecs.* v. *Western Auto Supply Co.*, 975 F.2d 474, 478 (8th Cir.1992). We review the district court's denial of injunctive relief for abuse of discretion. See *Goff* v. *Harper*, 60 F.3d 518, 520 (8th Cir.1995). "Abuse of discretion occurs if the district court rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions." *Hosna* v. *Groose*, 80 F.3d 298, 303 (8th Cir.) (quotations and citations omitted), cert. denied, --- U.S. ----, 117 S.Ct. 164, --- L.Ed.2d ----(1996). See also *Walser* v. *Toyota Motor Sales, U.S.A., Inc.*, 43 F.3d 396, 401 (8th Cir.1994) ("We will not disturb a district court's discretionary decision if that decision remains within the range of choice available to the district court, accounts for all relevant factors, does not rely on any irrelevant factors, and does not constitute a clear error of judgment." (quotations and citations omitted)).

In analyzing SDDS's motion for injunctive relief, the district court stated that:

> Essentially, SDDS's claim for injunctive relief seeks to have this Court enjoin a proceeding before the South Dakota Supreme Court. This Court declines to take such action.

*SDDS, Inc.* v. *State of S.D.*, Civil No. 91-5121 (D.S.D. May 28, 1996), reprinted in I Appellant's App. at Tab 12. While this description overstates the degree of relief requested by SDDS--which sought to enjoin the relitigation of specific issues, rather than a blanket injunction of all consideration of its dispute with the Defendants by the South Dakota Supreme Court--it does represent a proper concern by the district court for a core element of federalism, embodied by the Anti-Injunction Act, that the federal courts should not interfere with the state courts' operation. See, e.g., *Southwest Airlines Co.* v. *Texas Int'l Airlines*, 546 F.2d 84, 91 (5th Cir.1977) ( "few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies" (analyzing abstention doctrine and Anti-Injunction Act) (quoting *Railroad Comm'n* v. *Pullman Co.*,

312 U.S. 496, 500, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941))), cert. denied, 434 U.S. 832, 98 S.Ct. 117, 54 L.Ed.2d 93 (1977); but see *United States* v. *Rural Elec. Convenience Co-Op. Co.*, 922 F.2d 429, 439 (7th Cir.1991) ("we do not believe that comity and federalism should be considered 'public interest' factors that militate against the issuance of an injunction").

The district court's analysis fails, however, to consider the factors which support the issuance of injunctive relief in this case. In *Dataphase Sys., Inc.* v. *C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir.1981) (en banc), this Court held that:

> Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Applying the Dataphase factors to the case before us, we conclude that the district court abused its discretion in denying injunctive relief. Requiring SDDS to relitigate in the state court issues previously decided by this Court constitutes an irreparable harm. See, e.g., *Daewoo*, 975 F.2d at 478 (affirming district court's finding that petitioner "would suffer irreparable harm if injunctive relief were not issued because it would face relitigation of claims already adjudicated in its favor").[15]

While issuing the injunction in this case will foreclose the opportunity for the Defendants to relitigate issues in the state court, we do not believe that this is a legitimate harm which must be

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[15] A petitioner seeking to enjoin a criminal or quasi-criminal state court proceeding must demonstrate a threat of "great and immediate irreparable injury that cannot be eliminated by his defense to the state proceeding." *Goodrich* v. *Supreme Court of S.D.*, 511 F.2d 316, 317 (8th Cir.1975) (refusing to enjoin state court disbarment proceeding (citing *Younger* v. *Harris*, 401 U.S. 37, 46, 91 S.Ct. 746, 751, 27 L.Ed.2d 669 (1971))). Where a petitioner seeks to enjoin a state court's civil proceeding, however, we have only required a showing of "irreparable harm" to allow a grant of injunctive relief. See *Daewoo*, 975 F.2d at 478 (analyzing *Goodrich*).

balanced. As noted above, the Defendants had one full and fair opportunity to litigate these issues in the federal forum, and the rules of equity do not require that they be given a second bite at the apple in the state forum in order to obtain a more favorable result. See, e.g., *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299, 37 S.Ct. 506, 508, 61 L.Ed. 1148 (1917) ("This doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect." (quotations and citation omitted)).

The third and fourth Dataphase elements also support issuance of an injunction in this case. As discussed above, SDDS successfully litigated in *SDDS VI* the issues currently contested by the Defendants; SDDS's success on the merits of the underlying issue is therefore already secured. In addition, the public policy concerns of finality and repose informing our res judicata jurisprudence strongly supports the protection of our previous judgment. While the interference with a state court proceeding is generally opposed by public policy, this "injunction will promote judicial economy and protection of parties from harassing, duplicative litigation, interests which the federal and state courts share." *Daewoo*, 975 F.2d at 479 (citation omitted).

We find no merit in the Defendants' remaining arguments opposing the granting of injunctive relief. We therefore reverse the district court's denial of injunctive relief in this case, and remand to the district court for an order enjoining the Defendants from relitigating in the South Dakota state courts the issues of (1) whether SDDS had a legitimate claim of entitlement to a permit to operate an MSWD, and (2) whether the referendum was the proximate cause of SDDS's dissolution.

## APPENDIX D

**SDDS, INC., a South Dakota corporation, Appellant,**

**v.**

**STATE OF SOUTH DAKOTA; Mark W. Barnett, Attorney General of the State of South Dakota; Walter D. Miller, as Governor of the State of South Dakota; Joyce Hazeltine, Secretary of State of the State of South Dakota, Appellees, Action for the Environment, Intervenor Below.**

**No. 94-1688.**

United States Court of Appeals,

Eighth Circuit.

Submitted Nov. 15, 1994.

Decided Feb. 6, 1995.

Corporation which sought to construct and operate solid waste disposal facility brought action against state-related parties, challenging constitutionality of state referendum which vetoed statute approving construction and operation of facility and seeking declaratory and injunctive relief and recovery under civil rights statutes. State-related parties moved for summary judgment. The United States District Court, District of South Dakota, granted judgment of dismissal. Corporation appealed. The *Court of Appeals*, 994 F.2d 486, reversed and remanded. On remand, the District Court, Richard H. Battey, Chief Judge, 843 F.Supp. 546, granted summary judgment for state-related parties, and corporation appealed. The Court of Appeals, Magill, Circuit Judge, held that referendum was invalid under dormant commerce clause.

Reversed and remanded.

Edward T. Lyons, Jr., Denver, CO. (David E. Driggers and Thomas J. Burke, Jr., on the brief), for appellant.

Roxanne Giedd, Asst. Atty. Gen., Pierre, SD (Diane Best, Asst. Atty. Gen., on the brief), for appellee.

Before MAGILL, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and BEAM, Circuit Judge.

MAGILL, Circuit Judge.

South Dakota Disposal Systems, Inc., (SDDS) appeals the district court's grant of summary judgment to the defendants, the State of South Dakota and various state officials (collectively, "South Dakota"), and its denial of SDDS's cross-motion for summary judgment. At issue in this § 1983 suit is whether the referendum of a measure permitting SDDS to operate a large-scale municipal solid waste disposal (MSWD) facility in South Dakota violates the dormant commerce clause or SDDS's rights to due process and equal protection. Because we find that the referendum was the latest in a series of protectionist roadblocks erected by South Dakota, we hold that the referendum violates the dormant commerce clause. Accordingly, we reverse.[1]

## I. BACKGROUND

This appeal is the latest in a seemingly never-ending series of cases arising from SDDS's six-year-long struggle to develop a large-scale MSWD facility near Edgemont, South Dakota. In November 1988, SDDS filed with the South Dakota Department of Water and Natural Resources (DWNR)[2] an application for a permit to site, construct and operate a MSWD facility (the Lonetree facility). At the time, South Dakota's administrative permitting procedure for SWD facilities was to issue a one-year initial permit if the facility was determined to be environmentally safe and in the public interest, then to issue five-year renewals of that permit after de novo review of the safety of the facility. See S.D. CODIFIED

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[1] We express no view as to the merits of the due process or equal protection claims brought by SDDS.

[2] The Department has since changed its name to the Department of Environment and Natural Resources. We will use the old name throughout this opinion in the hope that it may, in some small way, simplify this appeal.

Laws § 34A-6-1.16 (1986 & Supp.1989). After much judicial[3] and political[4] wrangling, the Board of Minerals and the Environment (BME), a branch of the DWNR, held a hearing on whether SDDS's application should be granted. The BME determined that the Lonetree facility was environmentally safe and in the public interest, as required by S.D. CODIFIED Laws § 34A-6-1.13 (1986 & Supp.1989), and issued the initial one-year permit on September 9, 1989. While the one-year permit was in effect, SDDS applied for a five-year renewal permit. The BME conducted additional hearings and issued the renewal permit in December 1990 based on independent findings that the Lonetree facility was safe and in the public interest.

SDDS's two permits have generated much litigation. In *In re Application of SDDS, Inc.*, for a *Solid Waste Permit*, 472 N.W.2d 502 (S.D. 1991) (*SDDS I*), the South Dakota Supreme Court held that when the BME issued the original one- year permit, it did not make sufficient factual findings from which the court could determine whether the Lonetree facility was in the public interest. The court remanded for factual findings,[5] but did not address the

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[3] The DWNR failed to act upon the application within 120 days, as required by S.D. ADMIN. R. 74:27:04:05(2). SDDS sued, and in *SDDS, Inc.* v. *South Dakota Dep't of Water & Natural Resources, Civ. Case* No. 18- 179 (S.D. 6th Cir.Ct. July 5, 1989), the DWNR was ordered to act upon the application.

[4] After it was forced to act, the DWNR initially recommended that the application be approved. South Dakota Governor Mickelson intervened and caused the DWNR to reverse its position, resulting in a referral to the BME.

[5] In 1991, S.D.Codified Laws § 34A-6-1.13 was amended and the implementing regulations were rewritten. Although the ultimate question of whether the facility was environmentally safe and in the public interest remained the same, several factors weighing into the agency's decision changed. On remand after *SDDS I*, the agency made the specific findings required by its revised regulations. The agency found the Lonetree facility to be environmentally safe, using language that parallels the applicable regulation. Appellant's App. at 117 (Finding # 52, parallelling S.D.Admin.R. 74:27:17:01). The agency found the facility to be in the

merits of whether the facility was in fact in the public interest. 472 N.W.2d at 512. In *In re 1990 Renewal Application of SDDS, Inc.*, 507 N.W.2d 702 (S.D. 1993) (*SDDS IV*), the South Dakota Supreme Court held that the renewal permit was void from its inception because the original one-year permit was found invalid in *SDDS I*. *SDDS IV*, 507 N.W.2d at 703-04.

Meanwhile, South Dakota voters addressed SDDS's attempt to develop the Lonetree facility by placing an initiative on the November 1990 ballot. This initiative required legislative approval of any large-scale SWD facility in addition to the administrative approval required of all SWD facilities regardless of size. Legislative approval was conditioned upon a finding that the facility was environmentally safe and in the public interest. Under South Dakota law, the Secretary of State is required to publish a pamphlet containing an Attorney General's explanation of, S.D.Codified Laws § 12-13-9 (1982 & Supp.1994), and public comment on, S.D. Codified Laws § 12-13-23 (1982 & Supp.1994), each initiated or referred measure. South Dakota stated at oral argument that this pamphlet is part of the legislative history of these initiated and referred measures. The Attorney General's explanation of the November 1990 initiative stated that it would apply retroactively to existing facilities (i.e., the Lonetree facility), and that only one facility (i.e., the Lonetree facility) would be affected. The initiative was passed in the November 1990 election, and is codified at S.D.Codified Laws § 34A-6-53 to 56 (1992).

Shortly after the initiative was passed, the South Dakota legislature passed, and the governor signed, 1991 S.B. 169, codified at S.D.Codified Laws § 34A- 6-57 (1992), which gave the required legislative approval to the Lonetree facility. A referendum on S.B. 169 was certified on May 8, 1991. The Attorney General prepared an explanation of S.B. 169 and published arguments pro and con. The Attorney General's explanation states that the legislature found

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public interest. Appellant's App. at 121 (Finding # 72). Both findings were preceded by numerous supporting factual findings. The revised BME findings also contain a specific legal conclusion that all requirements for the permit had been met. Appellant's App. at 122 (Conclusions of law # 3 & # 4).

the facility to be environmentally safe and in the public interest and that the DWNR permits were "declared invalid in a court decision." The three-sentence "pro" statement mentions public support for the facility in the Edgemont area, the issuance of permits by the DWNR and the legislature, and the economic impact of the facility.

The "con" statement is the most significant part of the explanatory pamphlet in terms of length and impact. Because of the importance of this statement, we set it out at length:

> Referred Law # 1 is a direct public vote on the Lonetree mega-garbage dump near Edgemont. South Dakota Disposal Systems, Inc. (SDDS), Lonetree's owner, has stated 95% of the waste will come from out-of-state. The Board of Minerals and Environment and the legislature gave SDDS approval to bring in 65 railroad cars of garbage per day, seven days per week.
>
> ACTion for the Environment has referred that approval to a vote because South Dakota is not the nation's dumping grounds. A "NO" vote will prevent Lonetree from operating, and keep its imported garbage out of South Dakota.
>
> The U.S. Environmental Protection Agency has stated that all landfills eventually deteriorate, and new technologies only delay leaks further into the future (Federal Register, August 30, 1988). NIMBY (not in my backyard) exists because people do not want their soil, air and water contaminated.
>
> ....
>
> ... Lonetree is not an option for South Dakota communities. It is an out-of-state dump. To the extent we become the nation's dumping grounds, we undermine successful recycling efforts elsewhere. Vote "NO" on Lonetree.

Appellant's Add. at 38. In November 1992, the referred measure was defeated, effectively vetoing the Lonetree facility.[6] *SDDS, Inc.* v. *South Dakota*, 994 F.2d 486, 489 (8th Cir.1993) (SDDS V).

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[6] S.B. 169 never had any effect because it would not become effective as law unless and until it passed the referendum. *SDDS, Inc.* v. *State*, 481 N.W.2d 270 (S.D.1992) (*SDDS II*).

These legislative activities spawned several additional lawsuits. SDDS challenged the initiative that required dual legislative and administrative approval. In *SDDS, Inc.* v. *State*, Civ. Case No. 90-412 (S.D. 6th Cir.Ct. Oct. 31, 1991) (*SDDS III*), South Dakota state judge Steven L. Zinter upheld the initiative against several attacks virtually identical to those now mounted against the referendum. Judge Zinter's decision in *SDDS III* was not appealed.

All these events bring us to the procedural history of this case in the federal courts. This appeal is the second time we have encountered the referendum. In *SDDS V*, we reversed the district court's grant of summary judgment for South Dakota and remanded the case for further proceedings. The issue resolved in *SDDS V* was whether Judge Zinter's decision concerning the legality of the initiative (*SDDS III*) precluded litigation of the legality of the referendum (*SDDS V*) under the doctrine of collateral estoppel. We held that it did not. On remand, the district court granted summary judgment for South Dakota a second time, holding that there was no due process violation because SDDS had no affected property interest, no commerce clause violation and no equal protection violation. 843 F.Supp. 546, 562 (D.S.D.1994). SDDS's cross-motion for summary judgment was denied. This appeal followed.

## II. DISCUSSION

### A. The General Framework: Varying Levels of Scrutiny

The Supreme Court has established a two-step approach to the dormant commerce clause. The first step requires us to determine whether a challenged state measure discriminates against out-of-state articles (i.e., is a protectionist measure). Discrimination may take one of three forms. See *Chemical Waste Mgmt.* v. *Hunt*, 504 U.S. 334, ---- n. 6, 112 S.Ct. 2009, 2015 n. 6, 119 L.Ed.2d 121 (1992) (noting three types of discrimination); *Southern States Landfill* v. *Georgia DNR*, 801 F.Supp. 725, 730-31 (M.D.Ga.1992) (finding statute discriminatory on its face, in purpose and in effect); *Waste Recycling* v. *Southeast Ala. Solid Waste Disposal*, 814 F.Supp. 1566 (M.D.Ala.1993), affirmed, 29 F.3d 641 (11th Cir.1994). First, a measure may facially discriminate against out-of-state articles. See, e.g., *Philadelphia* v. *New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978) (facial discrimination where state statute

prohibited importation of waste "which originated or was collected outside the territorial limits of the State"); *Hughes* v. *Oklahoma*, 441 U.S. 322, 336-37, 99 S.Ct. 1727, 1736-37, 60 L.Ed.2d 250 (1979) (facial discrimination where state statute provided that no one "may ship or transport minnows for sale into this state from an outside source"); *In re Southeast Ark. Landfill, Inc.*, 981 F.2d 372, 373 (8th Cir.1992) (facial discrimination where state statute divided state into eight districts and restricted receipt of waste originating "outside of the District in which [a landfill] is located"); *Waste Sys. Corp.* v. *County of Martin, Minn.*, 985 F.2d 1381, 1386 (8th Cir.1993) (facial discrimination where ordinance required disposal of MSW generated within county at in-county disposal facility). No one contends that the referendum is facially discriminatory. However, facial discrimination is merely one of the ways in which a state may "artlessly disclose an avowed purpose to discriminate." *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354, 71 S.Ct. 295, 298, 95 L.Ed. 329 (1951).

The other two forms of discrimination are more subtle and require us to examine the overall effect of the challenged measures.[7] *Waste Sys. Corp.*, 985 F.2d at 1386. A second way in which a challenged measure may discriminate is that a facially neutral measure may have a discriminatory purpose. See, e.g., *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53, 97 S.Ct. 2434, 2446-47, 53 L.Ed.2d 383 (1977) (discriminatory purpose where facially neutral state statute prohibiting state grading from appearing on apple boxes discriminated against Washington apples that carry state grades). Third, a facially neutral measure may have a discriminatory effect. See, e.g., *Maine* v. *Taylor*, 477 U.S. 131, 148 n. 19, 106 S.Ct. 2440, 2453 n. 19, 91 L.Ed.2d 110 (1986) (discriminatory effect may be found where state "respond[s] to legitimate local concerns by discriminating arbitrarily against interstate trade"); *GSW, Inc.* v. *Long County, Ga.*, 999 F.2d 1508, 1517 (11th Cir. 1993) (discriminatory effect where county imposed

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[7] "[T]he evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia*, 437 U.S. at 626, 98 S.Ct. at 2536-37. Facial discrimination generally involves a discriminatory purpose and a discriminatory effect, while the other two forms of discrimination involve one or the other.

150-mile restriction on origin of waste); *Government Suppliers Consol. Serv.* v. *Bayh*, 975 F.2d 1267, 1278-79 (7th Cir.1992) (discriminatory effect where state statute imposed "backhaul ban" and additional registration and stickering requirements), cert. denied, 506 U.S. 1053, 113 S.Ct. 977, 122 L.Ed.2d 131 (1993).

At the second step of the analysis, we apply the appropriate level of scrutiny. The Supreme Court has established two levels of scrutiny. The determinative factor is the presence or absence of discrimination against interstate commerce. If the state measure is discriminatory, it is subjected to the "strictest scrutiny," *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality of the State of Oregon*, 511 U.S. 93, ----, 114 S.Ct. 1345, 1351, 128 L.Ed.2d 13 (1994) (quoting *Hughes*, 441 U.S. at 337, 99 S.Ct. at 1736-37), and a "virtually per se rule of invalidity" applies. *Oregon Waste Sys.*, 511 U.S. at ----, 114 S.Ct. at 1351 (quoting *Philadelphia*, 437 U.S. at 624, 98 S.Ct. at 2535-36); *Southeast Ark. Landfill*, 981 F.2d at 375.[8] If "other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade," the measure is subjected to a more flexible balancing test. *Pike* v. *Bruce Church*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970); *Philadelphia*, 437 U.S. at 624, 98 S.Ct. at 2535-36; *Waste Sys. Corp.*, 985 F.2d at 1385-86; *Southeast Ark. Landfill*, 981 F.2d at 375. We address each of these two steps in turn.

**B. What Level of Scrutiny: Is there discrimination?**

Although the referendum is not facially discriminatory, we find that the referendum was certified and that the referred measure was

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[8] We (and numerous other courts) have previously stated that Philadelphia establishes a "per se rule of invalidity." *Waste Sys. Corp.*, 985 F.2d at 1387. Although this statement may be inaccurate in a technical sense (the full quotation from Philadelphia is "a virtually per se rule of invalidity"), it accurately states the results of cases in which strict scrutiny is applied. The only way that discriminatory state action can withstand this level of scrutiny is if the state demonstrates that the out-of-state articles are more dangerous than are in-state articles. *Chemical Waste Mgmt.*, 504 U.S. at ---- - ----, 112 S.Ct. at 2014-15 (applying principle to waste); *Taylor*, 477 U.S. at 131, 106 S.Ct. at 2440-43. Neither party to this appeal makes any such claim.

defeated for a discriminatory purpose. We also find that the referendum has a discriminatory effect against interstate commerce. We therefore apply the "strictest scrutiny" to the referendum.

1. Does the referendum have a discriminatory purpose?

The presence of a discriminatory purpose is one of three ways to trigger strict scrutiny. *Hunt*, 432 U.S. at 352-53, 97 S.Ct. at 2446-47; *Chemical Waste Mgmt.*, 504 U.S. at ---- n. 6, 112 S.Ct. at 2015 n. 6; *Waste Sys. Corp.*, 985 F.2d at 1381. The record is replete with direct and indirect evidence of an avowed discriminatory purpose behind the referendum.

The record contains two pieces of direct evidence of a discriminatory purpose. First, in *SDDS III*, Judge Zinter noted that the initiative "was purposely drafted to insure that, except for Lonetree, the Initiated Measure would not apply to existing or foreseeable future landfills that dispose of South Dakota waste." Appellant's App. at 184. The dual administrative and legislative approval required by the initiative was specifically designed and intended to hinder the importation of out-of-state waste into South Dakota. The purpose of the first and only referendum under the initiative cannot be divorced from the purpose of the initiative itself. The initiative was drafted to defeat a specific "out-of-state dump" by requiring an additional approval, and the referendum concerns that very approval for the same "out-of-state dump." We believe that the discriminatory purpose behind the initiative infected the referendum as well. Second, the legislative history of the referred measure is brimming with protectionist rhetoric. The state-sponsored pamphlet that accompanied the referendum contained a "con" statement that exhorted voters to vote against the "out-of-state dump" because "South Dakota is not the nation's dumping grounds," and "[a] 'NO' vote will prevent Lonetree from operating, and keep its imported garbage out of South Dakota." This is ample evidence of a discriminatory purpose to trigger strict scrutiny.

In addition to this direct evidence of a discriminatory purpose, there is substantial indirect evidence that the referendum was motivated by a discriminatory purpose. In *Hunt*, the Supreme Court found "it somewhat suspect" that the means used to achieve the state's "ostensible ... purpose" were relatively ineffective. *Hunt*,

432 U.S. at 352, 97 S.Ct. at 2446. Likewise, South Dakota has employed a highly ineffective means to pursue its ostensible purpose of environmental protection. After the initiative passed, a large-scale MSWD facility in South Dakota was required to obtain two things: an administrative permit and legislative authorization. South Dakota argues that large MSWD facilities generally pose a greater risk to the environment than do smaller facilities. We will assume for the sake of our decision that this is true. However, although the general difference in risk between larger and smaller facilities justifies a general requirement of legislative approval for large MSWD facilities, a general difference in risk, without more, is insufficient to support a particular denial of legislative approval. South Dakota must demonstrate not only that there are legitimate interests justifying the general requirement of dual approval, but it must also show that this particular review furthered those goals. Although *SDDS III* establishes that requiring both administrative and legislative approval for large facilities is permissible because the difference in risk between large and small facilities is a legitimate state interest, South Dakota has completely failed to demonstrate that the referendum that denied legislative approval for the Lonetree facility in any way furthered the state's legitimate concerns with safety and environmental protection.

South Dakota's most significant environmental protection device is the administrative permitting process for SWD facilities. Anyone who sites, develops or operates a SWD facility in South Dakota must obtain a permit from the DWNR. S.D.Codified Laws § 34A-6-1.4 (1992). SDDS sought a permit for the Lonetree facility from the DWNR, and when the permit was contested, the BME held hearings to determine whether the Lonetree facility was environmentally safe and in the public interest. The permit was granted, appealed, remanded, reissued, reappealed, renewed, and ultimately voided. The fact that SDDS's permit for the Lonetree facility was so carefully scrutinized indicates that the administrative permitting process is a relatively effective means of environmental protection. In fact, South Dakota admits that the Lonetree facility is safe and in the public interest if operated in accordance with the DWNR permit conditions. Appellant's App. at 165. Thus, the benefit of the added requirement of legislative approval is not that the legislature provides the sole means by which South Dakota

protects its environment from potentially unsafe SWD facilities. Rather, the legislative approval provides a second opportunity to review the proposed facility. Thus, the dual process provides an incremental benefit over the administrative process alone to the extent that the legislature is able to detect unsafe facilities that are not detected by the DWNR.

Because the benefit of legislative review is that it screens out unsafe large facilities that survived the administrative review process, the benefit of each legislative review is directly proportional to the amount of scrutiny of the environmental effects of the proposed facility that occurs in that review.[9] The challenged referendum cannot be said to have provided any benefits because the body that disapproved the Lonetree facility (i.e., the South Dakota electorate) was provided with: (1) no standards or information to use to evaluate the benefits and risks of the Lonetree facility; and (2) information that leads to an unreliable result. South Dakota has admitted that there were no standards to guide the electorate. Appellant's App. at 166. Indeed, in *SDDS III*, Judge Zinter noted that the referral was a "standardless review by the electorate." Appellant's App. at 207 n. 9. The voters simply voted yes or no without any criteria and with severely limited information to guide them in evaluating the effects of the Lonetree facility. Thus, because the voters were not provided with any meaningful criteria, the defeat of the referred measure cannot be seen as improving environmental protection.

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[9] Viewing the benefit in this manner distinguishes the dual permitting measure from the absolute bans on large landfills that have been approved in dicta. See, e.g., *Southeast Ark. Landfill*, 981 F.2d at 376; *Fort Gratiot Landfill* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353, ----, 112 S.Ct. 2019, 2027, 119 L.Ed.2d 139 (1992). An absolute ban is analogous to a permissible quarantine law. There is a legitimate state interest in environmental protection, and the absolute ban is the best, or at least a permissible, way to achieve this goal. South Dakota's legislative review process, by contrast, although supported by the same state interest in the abstract, simply does nothing to further this purported goal. Thus, the fact that legislative review is less restrictive than an absolute ban, rather than being an asset, proves fatal.

Additionally, voters were bombarded with protectionist propaganda that renders the result of the referendum unreliable as an environmental review. The legislative history of the referred measure consists largely of the state- sponsored explanatory pamphlet that contains an official explanation and arguments pro and con. Since the referred measure was defeated, the "con" statement is the most important. See *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 680, 101 S.Ct. 1309, 1321, 67 L.Ed.2d 580 (1981) (Justices Brennan and Marshall, concurring in judgment) (noting that dispositive issue is lawmakers' assessment of benefits and burdens). The con statement mentions general findings by the EPA that all landfills eventually degenerate, and also mentions recycling and the potential for hazardous waste dumping. However, no connection is made between these vague and general statements and the Lonetree facility. Moreover, the few specific environmental concerns that are mentioned in the middle four paragraphs are sandwiched between five paragraphs containing pleas to reject "imported garbage" and the "out-of-state dump." This protectionist concern clearly emerges as the dominant reason to reject the referred measure. The opposition begins and ends its presentation with a plea to keep South Dakota from becoming the nation's dumping grounds. Such propaganda does nothing to enhance any meaningful review of the environmental impact; it merely allows protectionism to run rampant.

South Dakota purports to seek a second review of large-scale SWD facilities that pose increased environmental risks in order to protect its natural resources, but this particular review consisted of a referendum steeped in inflammatory propaganda and does virtually nothing to further this purported goal. This indirect evidence strengthens the conclusion that the denial of approval had a discriminatory purpose, and confirms our decision that the referendum must receive strict scrutiny.

2. Does the referendum have a discriminatory effect?

Alternatively, even if South Dakota had not openly declared a discriminatory purpose, the referendum is discriminatory in its effect, and this type of discrimination will also trigger strict

scrutiny.[10] *Hughes*, 441 U.S. at 336, 99 S.Ct. at 1736; *Hunt*, 432 U.S. at 352-53, 97 S.Ct. at 2446-47. *Hunt* applied strict scrutiny to a facially neutral statute in a situation that is analogous to the referral of S.B. 169. In Hunt, North Carolina banned the placement of any grading (other than USDA grading) on closed shipping containers of apples. This measure affected only Washington state apples (which bore Washington state grades). Thus, in Hunt, out-of-staters were singled out to bear 100% of the cost of the measure. The structure of the "garbage market" in South Dakota is such that the referendum has a discriminatory effect. South Dakota generates 600,000 to 700,000 tons of MSW each year. In addition to this in-state waste, three facilities accept out-of- state waste (they accepted 60,000 tons in 1992). As a result of the low rate of domestic waste generation and the costs of regulation, the existing disposal facilities in South Dakota are fairly small; the largest facility disposes of 125,000 tons per year. New facilities must be large scale in order to recover the costs imposed by environmental regulations. The Lonetree facility was designed to accept 1.5 million tons of MSW per year. According to the literature accompanying the referendum, 95%[11] of this waste would originate outside South Dakota.

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[10] Despite the fact that it has previously conceded that "[t]he practical effect of the referendum was to prohibit the construction" of the Lonetree facility, Appellant's App. at 39, South Dakota now argues that because the BME permit had been revoked, the referendum had no impact, discriminatory or otherwise, on Lonetree. However, "[i]f this court were to ignore [South Dakota's] intermediary actions and look only to the result, it would reward [South Dakota] for acting unconstitutionally." *GSW, Inc.*, 999 F.2d at 1518. Moreover, the administrative permit was voided due to a procedural defect, not because of any finding that the Lonetree facility was environmentally dangerous. Thus, Lonetree could reapply for the administrative permit, and the referendum at the very least made the Lonetree project more difficult and expensive to accomplish. The absence of a reapplication to the BME is not fatal. See *Diamond Waste, Inc.* v. *Monroe County, Ga.*, 939 F.2d 941, 943 (11th Cir.1991) (applying Pike test to invalidate county's disallowance of landfill, despite absence of application required by statute).

[11] *SDDS III* found that 90% of the waste would originate outside South Dakota. Slip op. at 3. SDDS makes similar claims.

Hunt is analogous to this appeal because both involve a facially neutral measure that exports costs to out-of-staters.[12] Hunt was a case where North Carolina sought to eliminate Washington's competitive advantages, so that North Carolina farmers could usurp part of the North Carolina apple market that belonged to Washington growers. Here South Dakota is attempting to exclude out-of-state trash that has a "negative" value, thus forcing other states to bear the cost of disposing of the trash when the market would otherwise dispose of the trash in South Dakota. Any distinction between these two species of protectionism is of no consequence. *Waste Sys. Corp.*, 985 F.2d at 1386. Indeed, Judge Zinter noted an analogy between the initiative and Hunt in *SDDS III*. Appellant's App. at 182. Moreover, we note that in *SDDS III*, Judge Zinter specifically found that the initiative had a discriminatory effect. Slip op. at 14-15. Just as the purpose of the initiative and the referendum are intimately connected, so are the effects. Thus, because the garbage market of South Dakota is such that the referendum so predominantly affects only out-of-staters, we believe that the referendum of S.B. 169 is discriminatory in effect, and must receive strict scrutiny.

### C. Application of Strict Scrutiny

Once strict scrutiny is triggered, "the burden falls on the State to justify [the measure] both in terms of the local benefits flowing from the statute and the unavailability of a nondiscriminatory

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[12] The fact that only 90% rather than 100% of the costs of excluding the waste fall on out-of-staters does not eliminate the discriminatory effect. This fact merely reduces the scope of the discrimination. *Fort Gratiot*, 504 U.S. at ---, 112 S.Ct. at 2025; *Waste Sys. Corp.*, 985 F.2d at 1387 n. 11. The extent of the discrimination is not relevant to the prior determination whether the state has discriminated against interstate commerce. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 455-56, 112 S.Ct. 789, 801, 117 L.Ed.2d 1 (1992). In a similar vein, the fact that South Dakota later chose to permit importation of waste by the Big Stone plant goes only to the extent of the discrimination, not its existence. Moreover, because the issue is the referendum that was specific to Lonetree, it is questionable whether Big Stone has any relevance at all. To determine whether there was any discrimination, we must look to the effects on the garbage market as it existed at the time of the referendum.

alternative adequate to preserve the local interests at stake." *Hunt*, 432 U.S. at 353, 97 S.Ct. at 2446-47; *Chemical Waste Mgmt.*, 504 U.S. at ----, 112 S.Ct. at 2014. We find that the referendum fails both prongs of this test because the record demonstrates that (1) the denial of legislative approval by the referendum does not further the legitimate goal of environmental safety, and therefore provides no local benefits; and (2) a nondiscriminatory alternative is available because legislative review of the Lonetree facility may be obtained without a referendum in which the predominant argument is the imported nature of the garbage at Lonetree.

In order to survive strict scrutiny under the commerce clause, South Dakota first must demonstrate that the referendum on the Lonetree facility provided some local benefits. South Dakota identifies environmental protection as the sought-after benefit. Although the goal of environmental protection is a permissible one, as we have already discussed, the referendum on S.B. 169 simply does nothing to advance this goal. Because there is already one procedure in place to protect the environment, and this second review provides only an incremental amount of additional protection, this referendum in which voters were distracted by distinctly non-environmental concerns provided no local benefit. South Dakota has not carried its burden to prove that this referendum resulted in increased environmental protection.

To survive strict scrutiny, South Dakota must also demonstrate the lack of a nondiscriminatory alternative to this referendum under the dual permitting scheme. Things such as a new administrative agency or more stringent regulations are possible alternatives, but these were rejected as alternatives to the initiative by the South Dakota state court in *SDDS III*. However, *SDDS III* addressed only the initiative. *SDDS V*, 994 F.2d at 493-94. We must look at alternative ways in which this particular decision regarding legislative approval might have been made. When the focus is changed from the broad focus of *SDDS III* to a narrower focus on this particular decision, nondiscriminatory alternatives emerge. The most obvious alternative is a legislative discussion in which interstate trade issues are not the dominant issues discussed. This alternative may be easily achieved through a fuller discussion of the environmental issues, so that the record reflects that voters or legislators might reasonably have considered the environmental

issues. Such an alternative, which merely modifies the contents of the legislative discussion or the voter pamphlet accompanying a referred measure, would not be any more costly than the current procedure. The alternative would more fully achieve the desired effect of protecting the environment by forcing consideration of the environmental issues without the distortions of reasoning that result from the emphasis on protectionist propaganda.

Thus, because we hold that the referendum provided no local benefit, and that a nondiscriminatory alternative was available, we conclude that the referendum fails the required strict scrutiny. We therefore hold that South Dakota's referendum of S.B. 169 violates the dormant aspects of the commerce clause of the United States Constitution.

## III. CONCLUSION

We hold that South Dakota's referral of S.B. 169 violated the dormant commerce clause. Although facially neutral, the referendum had a discriminatory purpose and a sufficiently discriminatory effect to trigger strict scrutiny. Because we find that the referendum does not appreciably advance any legitimate local interest, and that nondiscriminatory alternatives are available to advance South Dakota's legitimate concerns, the referendum does not survive strict scrutiny. Accordingly, the judgment of the district court is reversed and we remand to the district court with instructions to enter judgment in favor of SDDS.

## APPENDIX E

**SDDS, INC., a South Dakota corporation,**
**Plaintiff and Appellant,**

**v.**

**STATE of South Dakota, William J. Janklow, as Governor, Joyce Hazeltine, as Secretary of State, and Mark Barnett, as Attorney General for the State of South Dakota, Defendants and Appellees.**

**No. 19555**

Supreme Court of South Dakota

ORDER DENYING REHEARING

A petition for rehearing in the above cause having been filed October 6, 1997, and no issue or question of law or fact appearing to have been overlooked or misapprehended, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices requesting a rehearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court, the petition for rehearing is denied.

DATED at Pierre, South Dakota, this 24th day of October, 1997.

BY THE COURT:

_____
Robert A. Miller, Chief Justice

ATTEST:

_____
Clerk of the Supreme Court
(SEAL)

FILED
APR 8 1998
CLERK

No. 97-1378

In The

# Supreme Court of the United States

October Term, 1997

STATE OF SOUTH DAKOTA; WILLIAM J. JANKLOW, as Governor; JOYCE HAZELTINE, as Secretary of State; and MARK BARNETT, as Attorney General,

*Petitioners,*

*vs.*

SDDS, INC.,

*Respondent.*

*On Petition for Writ of Certiorari to the Supreme Court of South Dakota*

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

In a separate case, the Court of Appeals for the Eighth Circuit declared unconstitutional a South Dakota statewide referendum which prohibited the development of an interstate landfill owned by Respondent and later, in ancillary proceedings, enjoined the Petitioners from relitigating in state court certain issues that had been decided against them in the federal suit. In the present case, the South Dakota Supreme Court held that the State was liable for taking Respondent's property in violation of the Fifth and Fourteenth Amendments and remanded the case for a state jury trial to determine damages. The questions presented are:

1. Whether the South Dakota Supreme Court's decision that the unconstitutional referendum effected a taking of Respondent's property, and remanding the case to the trial court to determine compensation, is a final judgment or decree reviewable by this Court under 28 U.S.C. § 1257.

2. Whether, on a petition for a writ of certiorari to review a decision of the South Dakota Supreme Court, this Court should entertain and decide a question of Eleventh Amendment immunity which was neither pressed nor passed upon in the state courts below.

3. Whether, if the question is properly before the Court, Eleventh Amendment immunity was waived, or if not, whether: (a) the federal court which held the referendum unconstitutional could effectuate that judgment by enjoining state officials from relitigating issues in state court; and (b) the federal court's unappealed decision, in which jurisdiction to issue the injunction was expressly determined, may be collaterally attacked in the present proceeding.

## PARTIES TO THE PROCEEDING

The Petition accurately identifies the parties.

Respondent SDDS, Inc., a South Dakota corporation, has neither a parent nor a subsidiary.

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## STATEMENT OF THE CASE

A restatement of the case is necessitated by inaccuracies and omissions in the State Defendants' statement.[1] To begin with, what shaped the decision below were not "unwarranted limits on state sovereignty," but rather, a long overdue vindication of the Fifth Amendment's takings clause. This case has far less to do with sovereign immunity than with a state-sponsored taking of property without just compensation. The unconstitutional taking is what brings the case here, not the Eleventh Amendment. It is also simply not true, as the State Defendants assert, that a federal court ordered the State of South Dakota "not to defend itself * * * in its own courts." As will once again be clear from a proper statement of the history of the case, the federal court's injunction only prevented the State Defendants from re-litigating two particular issues they had already litigated and lost in federal court — (1) whether SDDS had a property interest in a permit to operate Lonetree; and (2) whether the referendum was the proximate cause of SDDS's dissolution. *In re SDDS, Inc.*, 97 F.3d 1030, 1042 (8th Cir. 1996) ("*Lonetree IV*" as referred to by the State Defendants).[2]

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1. For simplicity, the Petitioners will be referred to as the "State Defendants" and the Respondent as "SDDS."

2. On these issues the State Defendants' were attempting to assign retroactive effect to the pronouncement of the South Dakota Supreme Court — two and one-half years after the referendum — that the permit SDDS was operating on at the time of the referendum was "void *ab initio*." But "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all * * * [T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature * * *." *Hughes v. State of Washington*, 389 U.S. 290, 296-98 (1967) (Stewart, J., concurring). If attempting retroactively to extinguish a property interest in a permit was indeed the only defense the State had from takings liability, this clearly says more about the paucity of the defense than the breadth of the injunction.

The injunction was not only permissible, but necessary, if the Constitution of the United states is to be upheld.

While a chronicle of the case could properly begin in 1988 when SDDS acquired its land and began development of the Lonetree interstate landfill, the constitutional dimensions of the case really began to take shape in 1990 when a special interest group opposed to Lonetree sponsored a statewide ballot initiative designed to stop the project. At that time the initial one-year permit required for the project had already been granted, and Lonetree was approximately four months from going into operation. The anti-Lonetree initiative which was enacted into law in the November 1990 general election in South Dakota, however, forced Lonetree to shut down immediately and required further specific legislative authorization before it could proceed. The constitutionality of this discriminatory legislation was challenged by SDDS in state court on due process, equal protection and commerce clause grounds. According to the State Defendants, the court "ruled against SDDS." This is another misstatement. The South Dakota trial court, while ruling against SDDS on its equal protection and commerce clause claims (notwithstanding the court's finding that the initiative discriminated against interstate commerce), held that the retroactive application of the initiative, which was what had shut down Lonetree, violated the due process clause of the Fourteenth Amendment.[3]

In the meantime, doubtless much to the consternation of the architects of the initiative, the South Dakota legislature

3. *SDDS, Inc., et al. v. South Dakota*, Circuit Court. 6th Jud. Cir., Hughes County, South Dakota, Civ. No. 90-412 (Oct. 31, 1991). This unreported opinion was quoted in *SDDS, Inc. v. State of South Dakota*, 994 F.2d 486, 490 (8th Cir. 1993) (*Lonetree I in the nomenclature of the State Defendants' brief*), in pertinent part, as follows: "* * * the Initiated Measure does violate the Due Process Clause of the United States and South Dakota Constitutions to the extent it required an immediate suspension, without notice or opportunity to be heard, of SDDS' right to operate the Lonetree facility under the September, 1989 permit."

enacted, and the Governor signed, the legislation authorizing Lonetree to proceed. Before the bill would have become effective on July 1, 1991, however, the opponents of Lonetree obtained sufficient signatures to refer the legislative approval of Lonetree to a vote at the 1992 general election. In the statewide vote on the referendum, the legislative approval of Lonetree was "vetoed," thus effectively destroying Lonetree.[4]

Meanwhile, on November 5, 1991, SDDS commenced an action in the United States District Court for the District of South Dakota against the State of South Dakota and its Governor and other named state officials seeking a declaratory judgment that the referendum violated SDDS's rights to due process and equal protection of the law, and interfered with interstate commerce, all in contravention of the Constitution of the United States. There have since been three final and unappealed judgments entered by the Eighth Circuit in that declaratory judgment action which are now being collaterally attacked by the State Defendants on Eleventh Amendment grounds in the present case. But the State Defendants were at all times, for the past six years, *consenting* participants in the federal court proceedings. Indeed, in their answer to the original complaint,

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4. The State Defendants say the referendum only "restricted the operation of a large-scale waste disposal facility on SDDS's property." *Petition*, p.2. This is a major understatement. The referendum "effectively vetoed" Lonetree's legislative approval, and "* * * the Lonetree project has been unable to proceed since." *Lonetree I*, 994 F.2d at 489. The State Defendants eventually conceded, after having first urged the contrary, that "[t]he practical effect of the referendum was to prohibit the construction" of Lonetree. *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 270 n.10 (8th Cir. 1995) ("*Lonetree III*" as referred to in the State Defendants' brief). This was of course why — after the State Defendants then turned around in state court and contended that the referendum was not the proximate cause of SDDS's injury -- that the Eighth Circuit directed the entry of an injunction to prohibit the State Defendants from relitigating whether the referendum "was the proximate cause of SDDS'S dissolution." *Lonetree IV*, 97 F.3d at 1042.

the State Defendants expressly *waived* the Eleventh Amendment in connection with the declaratory and prospective injunctive relief that was being sought and only invoked sovereign immunity "to the extent [the complaint] can be construed to involve a claim for monetary relief * * *"[5] Consistent with this clearly expressed partial waiver, the State itself, along with the individual state officers named as defendants, engaged in a lengthy but unsuccessful battle to uphold the referendum's constitutionality, never once during this time ever suggesting that the Eleventh Amendment barred SDDS's suit for declaratory and prospective injunctive relief.

The State Defendants, accordingly, neither invoked the Eleventh Amendment nor appealed the Eighth Circuit's 1993 decision which reversed the summary judgment granted in their favor and remanded the case to the district court "for a full explication of SDDS's federal constitutional claims." *Lonetree I*, 994 F.2d at 494.[6] Nor did the State invoke the Eleventh Amendment when it was ordered to pay SDDS's attorney fees pursuant to 42 U.S.C. § 1988. Likewise, in 1995 the State Defendants neither claimed sovereign immunity nor appealed when the Eighth Circuit reversed the second summary judgment in their favor and held that referendum was unconstitutional because it was "discriminatory [in] purpose and * * * effect," "does not appreciably advance any legitimate local interest," and "violates the dormant aspects of the commerce clause of

5. Defendants' Answer ¶ 24, *SDDS, Inc. v. State of South Dakota*, Civil No. 91-5121 (D.S.D.), filed November 27, 1991.

6. Thus rejecting the State's contention — which had been adopted by the district court — that the earlier state trial court decision holding that the initiated measure was *prospectively* constitutional, see note 3 *supra*, was "dispositive" of SDDS's constitutional challenge of the referendum. "A different due process issue faced the district court than the due process issue which faced the state court * * *" *Id.* The Court explained that by the time of the referendum SDDS had "secured" a five-year renewal permit and obtained legislative approval to operate the Lonetree facility. *Id.*

the United States Constitution." *Lonetree III*, 47 F.3d at 272. Nor did the State invoke immunity when it was once again ordered to pay SDDS's attorney fees.

It was not until the 1996 ancillary proceeding that the State Defendants interposed any Eleventh Amendment objection. Even then, however, the argument was not that there was a complete lack of jurisdiction over the State itself, but simply that the prospective injunctive relief sought by SDDS exceeded the limits allowed under the Eleventh Amendment and the Anti-Injunction Act's relitigation exception. In response to this, the Eighth Circuit noted that the State Defendants did not contend that the prior decision declaring the referendum unconstitutional had violated the Eleventh Amendment, and that any such contention would necessarily have been unsuccessful, since —

> [a]s a suit for prospective declaratory relief from South Dakota's ongoing violation of the dormant commerce clause, the Defendants could not have enjoyed immunity under the Eleventh Amendment.

*Longtree IV*, 97 F.3d at 1035 (citing *Ex Parte Young*, 209 U.S. 123, 159 (1908)). The State Defendants did not appeal and have never until the present collateral attack disputed that holding.

The Eighth Circuit went on in its 1996 decision to hold that the Eleventh Amendment does not bar an ancillary proceeding "for injunctive relief to prohibit a state defendant from relitigating in a state court issues previously decided in a federal court," and that the relitigation exception to the Anti-Injunction Act was designed to permit just such a result based on "well-recognized concepts of *res judicata* and collateral estoppel." *Lonetree IV*, 97 F.3d at 1036-37. The Court of Appeals expressly rejected the State Defendants' argument, based on *Green v. Mansour*, 474 U.S. 64 (1985), that granting such relief

would be tantamount to a "demand that this Court direct the South Dakota courts to grant SDDS a monetary award to be paid from the South Dakota state treasury," since unlike *Green*, which was an action to remedy an alleged past violation of constitutional rights,

> the suit before us has been brought to effectuate our judgment in [*Lonetree III* ], a "[r]emed[y] designed to end a continuing violation of federal law [which was] necessary to vindicate the federal interest in assuring the supremacy of that law."

*Lonetree IV*, 97 F.3d at 1036 n.7 (quoting *Green*, 474 U.S. at 68).

The State Defendants again chose not to appeal this crucial 1996 decision by the Eighth Circuit, and the resultant injunction that issued against them, despite the connection they obviously saw between the issues that had been decided against them in that case and the issues they were at that very moment attempting to relitigate in the ongoing state inverse condemnation case.[7] This deliberate election not to appeal leaves the decision of the Eighth Circuit beyond challenge at this time. Indeed, although the State Defendants devote a lengthy footnote in their brief to criticizing it, they now in fact concede that "the validity of this holding is not at issue here * * *" *Petition*, p.5, n.5.

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7. The State Defendants were aware of this connection from the beginning and had in fact tried to use it to their own advantage when they argued, in opposing a grant of attorney fees after the referendum had been declared unconstitutional, that SDDS had "obtained a judgment which can do it no good" in the inverse condemnation case because the Eighth Circuit had "let stand" the district court's ruling that SDDS "had no property interest which could be unlawfully taken." *Lonetree IV*, 97 F.3d at 1036 n.6. The Eighth Circuit held, however, that contrary to this reading of its prior decision "we did not 'let stand' any portion of the district court decision * * *; rather, we reversed the district court, and remanded the case * * * with instructions to enter judgment in favor of SDDS." *Id.*

Just how, then, the State Defendants would have this Court review the matter is the essential question left unanswered in their petition. The novel theory they have contrived is that the South Dakota Supreme Court committed reversible error when it accorded controlling finality to the issues determined by the Eighth Circuit. There are several problems with this, not the least of which, as the South Dakota Supreme Court noted, is that this is precisely what was mandated by time-honored principles of comity, *res judicata,* and collateral estoppel, as well as the supremacy clause itself.

> This holding pointedly curtails our examination of the subject. Federal court power to enjoin a party from relitigating an issue in state court previously decided in a federal forum is clear. It stems from the Anti-Injunction Act, 28 U.S.C. § 2283, which reinforces the federal interest in assuring appropriate supremacy under the Constitution. * * * It is founded in the well-recognized concepts of res judicata and collateral estoppel.

State Defendants' *App.* 7a-8a (footnote and citations omitted).

Moreover, if there was any error in this regard, it was incumbent on the State Defendants to bring it to the South Dakota Supreme Court's attention in a timely manner, rather than remaining silent, as they did, until it was too late for the court to pass on the question. On December 23, 1996, the South Dakota Supreme Court entered an order directing the parties to file supplemental briefs

> addressing the impact of the mandate issued in [the] federal action upon the issues on appeal before this Court and enumerating with specificity what issue or issues, if any, remain before this Court on appeal and also addressing whether this appeal should be dismissed.

Despite this request by the court for guidance, the State Defendants stood mute, and instead of submitting a brief "addressing the impact" of the Eighth Circuit's decision, as they were directed to do, the State Defendants filed a written "statement" in which they advised the South Dakota Supreme Court that they were "constrained" by the federal mandate from saying anything. This, of course, was untrue, and while the State Defendants were constrained from relitigating two narrowly defined issues, they remained free to advise the court of anything else that might bear upon the immediate question of the "impact" of the federal decision on the issue of takings liability that was pending before the state court. Certainly Eleventh Amendment immunity might have been such a matter.

If the State Defendants had then genuinely believed — as they are now contending in this Court — that the Eleventh Amendment rendered the proceedings in the federal court absolutely void, they would surely have advised their own state supreme court of this important bit of intelligence. Instead, they declined even to file a brief or submit oral argument. Even after the state supreme court acted, the State Defendants made no mention of the Eleventh Amendment in their petition for rehearing, which was confined to other matters of no pertinence here. The State Defendants' studied refusal to say anything about the Eleventh Amendment at the time the case was before their own state supreme court is utterly inconsistent with their present posture in this Court. The ineluctable conclusion is that the State Defendants always understood that they had no bona fide Eleventh Amendment defense — that if indeed such a defense was ever available, it had long since been waived. Either that or they deliberately sacrificed their own supreme court, like a pawn in an opening gambit, to mount a collateral attack on long-ago final federal court judgments.

## REASONS FOR DENYING THE WRIT

This case does not meet any of the criteria for certiorari review by this Court of a decision by the highest court of a state, including those having to do with jurisdiction. There has been no final judgment rendered in the matter by the South Dakota Supreme Court, to which the writ is sought. Nor was the federal question posited for review ever pressed or passed upon in the state court. The petition is in reality an impermissible collateral attack on three long since final judgments of the Court of Appeals for the Eighth Circuit. The Eleventh Amendment was in any event no bar to the federal case in which the State of South Dakota was at all times a nominal *consenting* participant and in which the relief granted was confined to declaratory and prospective injunctive relief from an ongoing violation of the Constitution and, in an ancillary proceeding, to effectuate the judgment of a federal court by enjoining the defendants from relitigating issues previously decided against them in the federal suit. The argument that follows will briefly address each of these deficiencies in the petition and discuss other related reasons for denying the petition.

### I.

### THE DECISION OF THE SOUTH DAKOTA SUPREME COURT IS NOT A FINAL JUDGMENT.

The Court's review of state court decisions is limited by 28 U.S.C. § 1257(a) to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." A state court judgment is final if it is "* * * an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co. v. Railroad Comm'n. of California*, 324 U.S. 548, 551 (1945). The finality requirement "is not one of those technicalities to be easily scorned. It is an important factor for the smooth working of our federal system." *Jefferson*

*v. City of Tarrant, Alabama*, __ U.S. __, 118 S. Ct. 481, 486 (1997) (quoting *Radio Station WOW, Inc., v. Johnson*, 326 U.S. 120 (1945)).

The South Dakota Supreme Court's decision is not a "final judgment" subject to review under 28 U.S.C. § 1257(a). It determined only that the State of South Dakota was liable to SDDS for taking its property in violation of the Fifth and Fourteenth Amendments and "* * * therefore remand[ed] the case to the circuit court for a jury's determination of what, if any, damages SDDS suffered at the hands of the State." State Defendants' *App.* 13a. Far from ending the litigation, the South Dakota Supreme Court determined only the liability portion of the takings equation and remanded the case to the trial court for a jury determination of just compensation.

State court decisions, such as that of the South Dakota Supreme Court, which determine only that property has been taken in violation of the Fifth and Fourteenth Amendments, but which leave the issue of just compensation for future determination, are "classic" examples of non-reviewable decisions. *See San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 632-633 (1980), wherein the Court noted:

> Ever since this Court's decision in *Grays Harbor Co. v. Coats-Fordney Co.*, 243 U.S. 251, 37 S. Ct. 295, 61 L. Ed. 702 (1917), a state court's holding that private property has been taken in violation of the Fifth and Fourteenth Amendments and that further proceedings are necessary to determine the compensation that must be paid has been regarded as a classic example of a decision not reviewable in this Court because it is not "final." In such a case, "the remaining litigation may raise other federal questions that may later come here." *Radio Station*

> *WOW, Inc. v. Johnson*, 326 U.S. 120, 127, 65 S. Ct. 1480, 89 L. Ed. 2092 (1945). This is because "the federal constitution question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163, 94 S. Ct. 407, 412, 38 L. Ed. 2d 379 (1973).

*See also Catlin v. United States*, 324 U.S. 229 (1945); *Republic Natural Gas Co. v. State of Oklahoma*, 334 U.S. 62 (1948); *O'Dell v. Espinosa*, 456 U.S. 430 (1982); and *Bruce v. Tobin*, 245 U.S. 18 (1917).[8]

The State Defendants argue in footnote 6 of their petition that the decision of the South Dakota Supreme Court is final and reviewable because it falls within the fourth category of judgments identified as final for purposes of review in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1967). The Court in *Cox*, however, specifically recognized that

> [i]n most, if not all, of the cases in these [four] categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date.

420 U.S. at 477. The Court then cited interlocutory eminent domain decisions as being different and non-reviewable:

> Eminent domain proceedings are of the type that may involve an interlocutory decision as to a federal

8. The South Dakota Supreme Court has similarly held that, in condemnation cases, orders determining only the necessity of a taking but not assessing just compensation are interlocutory only and not subject to appeal as a matter of right. *South Dakota Department of Transportation v. Freeman*, 378 N.W. 2d 241 (S.D. 1985).

> question with another federal question to be decided later. For in those cases the federal constitutional question embraces not only a taking but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem (citations omitted).

*Id.*, 420 U.S. at 477, n.6.

The decision of the South Dakota Supreme Court is clearly not reviewable under 28 U.S.C. § 1257(a) at this stage of the proceeding. Until a state jury determines the just compensation due SDDS for the taking, and the South Dakota Supreme Court issues its judgment on that issue thereby concluding both aspects of the takings case, review should be denied.

## II.

## THE FEDERAL ISSUE WAS NOT PRESSED OR PASSED UPON IN THE STATE COURT.

The State Defendants assert that the Supreme Court of South Dakota erred in holding that it was bound by the Eighth Circuit's judgment because the Eleventh Amendment rendered that judgment void. Since the State Defendants never raised this federal question before the state courts of South Dakota nor did those courts consider and decide the issue, review by this Court should be declined.

The jurisdiction of this Court to review the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897). A federal claim cannot be considered by the Court unless it has been either properly raised in the state court or considered and

expressly passed upon by the state court. *Cardinale v. Louisiana*, 394, U.S. 437 (1969) and *Webb v. Webb*, 451 U.S. 493 (1981). This is a threshold burden of the State Defendants, codified in the Court's Rule 14.1(g). Contrary to the requirements of the Rule, the State Defendants' statement of the case fails to specify when the Eleventh Amendment issue sought to be reviewed was raised in the South Dakota Supreme Court, the manner of raising it, and the way it was passed on by the state court. It was not.

The State Defendants' failure to raise the Eleventh Amendment claim in the state court was certainly not due to a lack of opportunity. Immediately after the Eighth Circuit's judgment was issued, the South Dakota Supreme Court ordered that SDDS and the State Defendants submit supplemental briefs addressing the impact of the federal court decision. Even though the jurisdiction of the federal court to enter an injunction against the State Defendants was clearly not an enjoined issue, the State Defendants declined to submit a supplemental brief. Following the issuance of the South Dakota Supreme Court's decision, the State Defendants filed a petition for rehearing that never mentioned the Eleventh Amendment nor questioned in any manner the jurisdiction of the federal court to enter the injunction against the State Defendants.

As a consequence of the State Defendants' failure to raise the federal claim, it was not considered and decided by the state court. This Court has repeatedly stated that when —

> the highest court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

*Street v. New York*, 394 U.S. 576, 582 (1969); *Fuller v. Oregon*, 417 U.S. 40, n.11 (1974); and *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945). Nowhere in the decision of the South

Dakota Supreme Court is the Eleventh Amendment or any other immunity even mentioned, let alone expressly considered. Unless the state court expressly passes upon the federal question as the result of a "real contest" on the point, there cannot be review in this Court. *Illinois v. Gates*, 462 U.S. 213 (1983) and *Beck v. Washington*, 369 U.S. 541 (1962).

## III.

## THE ELEVENTH AMENDMENT WAS NOT A BAR TO THE ACTION IN FEDERAL COURT.

The federal court action which was commenced in 1991 sought only declaratory and prospective injunctive relief from an unconstitutional statewide referendum that was designed to stop the operation of the Lonetree landfill. Neither that action nor the subsequent ancillary proceeding to effectuate the judgment declaring the referendum unconstitutional was barred by the Eleventh Amendment. The State Defendants overstate their case in relying on "black letter law" that an *unconsenting* state may never be named as a defendant in federal court. What they omit to mention is that in the present case the State of South Dakota *consented.* Even without that consent, the declaratory and prospective relief that was granted against state officials fits within well-recognized exceptions to a state's sovereign immunity, and was just as effective then, as it is now, whether or not the state itself is also named as a defendant.

### A. The State Expressly Waived Any Eleventh Amendment Defense It May Have Had.

The bar of the Eleventh Amendment is not absolute and, like any other privilege, may be waived. *Clark v. Barnard*, 108 U.S. 436, 447 (1883); *Gunter v. Atlantic Coast Line Railroad Co.*, 200 U.S. 273, 284 (1906). The State Defendants boldly assert that the waiver can only be effected by statute. This is a misstatement of the law. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 276 (1959) (The Eleventh

Amendment " * * *is an immunity which a State may waive at its pleasure * * * as by a general appearance in litigation in a federal court [citations omitted] or by statute [citations omitted]").[9] The state's own practice in such matters can suffice to support a waiver. *Sosna v. Iowa*, 419 U.S. 393, 396 n.2 (1975).

It appears that South Dakota's practice with respect to federal suits in which it chooses to participate in order to defend or vindicate an important policy of the state, and where only declaratory and prospective injunctive relief is sought against the state, has been to waive sovereign immunity through an express waiver in the answer filed under the authority of the State's Attorney General. SDCL 1-11-1(2) makes it the duty of the Attorney General,

> [w]hen requested by the Governor or either branch of the Legislature, or whenever in his judgment the welfare of the state demands, to appear for the state and prosecute or defend, ***in any court*** or before any officer, any cause or matter, civil or criminal, in which the state may be a party or interested.

(Emphasis supplied).

The present case is by no means the only time the State's Attorney General has appeared and filed such a waiver. For a recent example of another such case in this Court, decided this

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9. The State Defendants read too much into cases such as *Atascadero v. Scanlon*, 473 U.S. 234 (1985); *Edelman v. Jordan*, 415 U.S. 651 (1974) and *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459 (1945), which they cite for the proposition that immunity may only be waived by statute. None of these cases involved an express waiver such as was made in the State's answer in the present case. To the contrary, in each of them the state or its officials had at some juncture, at least on appeal if not earlier, invoked immunity. There is an obvious difference between an express written waiver, as in the present case, and attempting to imply waiver in the absence of manifested consent.

term, *see South Dakota v. Yankton Sioux Tribe*, __ U.S. __, 118 S. Ct. 789 (1998).[10]

Similarly, in the present case, when the State filed its answer to the complaint in the original federal suit in 1991, it expressly waived Eleventh Amendment immunity to the extent that the action was one for declaratory and prospective injunctive relief. South Dakota is, therefore, not an *unconsenting* state entitled to invoke its sovereign immunity at this time. To hold otherwise would only denigrate the "dignity and respect afforded a State, which the immunity is designed to protect," *Idaho v. Coeur d'Alene Tribe of Idaho*, __ U.S. __, 117 S. Ct. 2028, 2033 (1997), by allowing a state to play games with the Eleventh Amendment to manipulate federal courts and litigants by first consenting to suit, then litigating to achieve a desired result, and finally, after the end of the case, withdrawing its consent, or not, depending on its satisfaction with the outcome.

In any event, this part of the State Defendants' argument, the notion that a federal judgment against a state is always "void" in the absence of a statutory waiver of immunity, regardless of how plainly in a particular case the state may have expressed its consent to be bound, is in the final analysis a moot point, since had South Dakota never been joined as a defendant in its own name, or if at some point it is simply dropped from the case because it is immune, a valid suit nonetheless remains against the state officials in this case under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). The "continuing validity" of this doctrine was reaffirmed by this Court as recently as last term in *Coeur d'Alene Tribe of Idaho*, 117 S. Ct. at 2034. The applicability of the *Young* doctrine in the present case is beyond dispute, at least as concerns the original suit in federal court for

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10. In that case, like the present one, the answer filed by the State of South Dakota in the United States District Court for District of South Dakota, expressly waived the State's right to invoke the Eleventh Amendment. Answer of State of South Dakota ¶ V, filed November 7, 1994. Civ. No. 94-4217.

declaratory and prospective injunctive relief from the unconstitutional referendum on Lonetree.

> [T]he use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the State in its sovereign or governmental capacity.

*Ex Parte Young*, 209 U.S. at 159. The doctrine's continued applicability in the ancillary proceeding that followed will be discussed next.

**B. The Injunction Was Properly Granted in Ancillary Proceedings Pursuant To Ex Parte Young And The Relitigation Exception of the Anti-Injunction Act.**

The State Defendants' challenge *Ex Parte Young*'s application to the ancillary proceeding in which they were enjoined from relitigating issues that had been decided against them in the original action on the theory that since *Young* applies only in the case where prospective relief is sought from a "continuing violation" of federal rights, and that since the referendum had already been declared unconstitutional, there was no continuing violation to enjoin, or so the argument goes. The argument is much too clever, however, assuming, as it does, the very thing it sets out to prove, namely that an attempt by the State Defendants to circumvent the decision of the Eighth Circuit by relitigating in state court issues previously decided in the federal court is not a "continuing violation" of federal rights. The Court of Appeals for the Eighth Circuit rejected this as an "intolerable result," one that would render the decision of federal courts "largely nugatory and advisory." *Lonetree IV*, 97 F.3d at 1035-36. The Eleventh Amendment envisions no such demeaning of the judicial power of the United States.

It has thus always been clear, at least since *Gunter v. Atlantic Coast Line Railroad Co.*, 200 U.S. 273 (1906), that where

state defendants have been properly sued for a violation of federal rights, the court that declared such rights in the first instance retains jurisdiction, in an ancillary proceeding, to enforce by injunction the requirements of its prior decree, and this is in no way forbidden either by the Eleventh Amendment or the Anti-Injunction Act.

> None of the prohibitions * * * of the amendment or of the statute relate to the power of a Federal court to administer relief in causes where jurisdiction as to a state and its officers has been acquired as a result of the voluntary action of the state in submitting its rights to judicial determination.

*Id.*, 200 U.S. at 292. *See Mitchum v. Foster*, 407 U.S. 225, 235 (1972); *Milliken v. Bradley*, 433 U.S. 267, 289 (1977) (The reenacted relitigation exception has its "genesis in *Ex Parte Young* * * * [and] permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury"); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988) ("The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of *res judicata* and collateral estoppel.") Such concepts are fully binding on the states in respect of matters federally adjudicated. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958).

As this Court has explained,

> the availability of prospective relief of the sort awarded in *Ex Parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the * * * supremacy of that law.

*Green v. Mansour*, 474 U.S. 64, 68 (1985). The State Defendants attempt to limit *Ex Parte Young* in the manner suggested in their petition would relegate federal judgments to no more than precatory effect.

## IV.

## THE DECISION OF THE EIGHTH CIRCUIT IN WHICH THE FEDERAL ISSUE WAS RAISED, LITIGATED, LOST AND LEFT UNAPPEALED, MAY NOT NOW BE COLLATERALLY ATTACKED.

Conceding that ordinarily the result of an unappealed adverse decision may not be relitigated in a collateral proceeding, when the issue of subject matter jurisdiction was litigated and lost, the State Defendants argue that Eleventh Amendment immunity, partaking of notions of sovereign immunity, may *always* be raised collaterally, even if actually litigated and left unappealed. This is because, the State Defendants say, such judgments are always void. The State Defendants' argument, however, simply goes too far.

The district courts and courts of appeal have both power and obligation to decide issues presented in proceedings before them. Congress has conferred each with jurisdiction to determine both federal constitutional as well as federal statutory questions. 28 U.S.C. §§ 1291, 1331. In *Lonetree IV* the Eighth Circuit expressly determined that it had jurisdiction to issue the injunction. This Court has quite routinely held that where such determinations are made adversely to a litigant and left unappealed, allegations of error are necessarily subsumed in their finality. *Durfee v. Duke*, 375 U.S. 106, 111-115 (1963). Illustrating this principle, the Court in *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938), commented:

> Courts to determine the rights of parties are an integral part of our system of government. It is just

> as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

While the Court in *Durfee*, *supra*, to be sure, commented that "[d]octrines of federal pre-emption or sovereign immunity may in some contexts" dictate otherwise, *id.*, 375 U.S. at 114, this Court's historical treatment of the issue has never suggested that an otherwise final and unappealed judgment rejecting claims of Eleventh Amendment immunity, *as in this context*, involving a prior, reasoned application of the *Ex Parte Young* exception to Eleventh Amendment immunity, should be treated as anything other than one validating the Court's longstanding view favoring finality. Notably, for example, the State Defendants nowhere in their Petition suggest any circumstance which would have prevented them from taking a direct appeal of *Lonetree IV*, or why their apparent determination at the time not to take a direct appeal justifies the uncertainty which they now claim forever attaches to the Eighth Circuit's decision in *Lonetree IV*. The Court's normal view, under these facts, is the right one to be applied here. *Jackson v. Irving Trust Co.*, 311 U.S. 494, 503 (1941); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 378 (1940).

The State Defendants' reliance on such cases as *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506 (1940), and *Kalb v. Feuerstein*, 308 U.S. 433 (1940), is misplaced. *United States Fidelity & Guar. Co.* involved an action in which a surety company sought to set up as a bar to claims by the United States a judgment it had obtained in a United States District Court against an Indian tribe for which the United

States had acted as trustee. The Court held that Congress had not consented to consideration of the surety's claims in the court in which the judgment had been rendered and that the judgment in question was therefore open to collateral attack. Eleventh Amendment immunity was not an issue in that case, but just as importantly, and unlike that here, the issue of the claimed immunity to judgment asserted by the United States had neither been raised nor litigated in the court in which the judgment was originally entered.

*Kalb* is even wider of the mark. There, the Court determined on appeal from the Wisconsin Supreme Court that the Wisconsin state trial court lacked jurisdiction to confirm a farm foreclosure and to eject the foreclosed farmers, who were petitioners in bankruptcy. *Kalb* involved a direct appeal, and merely held that the state court proceedings giving rise to the appeals could be collaterally attacked in the federal bankruptcy court under that court's plenary powers conferred by federal bankruptcy statutes.

As part of its concluding collateral attack on *Lonetree IV*, the State Defendants contend in the last section of their Petition that the South Dakota Supreme Court was itself effectively, and unlawfully, enjoined at the instance of the Eighth Circuit, because the South Dakota Supreme Court had held it was "bound" by *Lonetree IV.* However, it was not just the "* * *[re-litigation] exception to the Anti-Injunction Act, * * *" but also "* * * principles of comity, *res judicata* and collateral estoppel * * *" by which that court considered its consideration curtailed. State Defendants' *App.* 8a. The South Dakota Supreme Court's holding in this respect, however, was clearly not that it was enjoined, but simply an accurate application of governing preclusion principles under either federal or state law. *Parsons Steel, Inc. v. First Ala. Bank*, 174 U.S. 518, 524 (1986); *Moe v. Moe*, 496 N.W. 2d 593, 595 (S.D. 1993).

Any other result would allow a litigant who chose to raise and to urge Eleventh Amendment immunity, on the one hand, and, despite a resulting adverse determination as to which the losing litigant also chose not to seek direct review, on the other, to escape the consequences of collateral estoppel and *res judicata*. As the Eighth Circuit held in rejecting the State Defendants' similar claims that no *res judicata* or collateral estoppel effect attached to its decision in *Lonetree III*, one applicable with equal force in the context of the *Ex Parte Young* exception to Eleventh Amendment immunity, any other result would render otherwise final judgments of the federal courts "* * * largely nugatory and advisory * * * ," leading to an "intolerable result, * * * not * * * mandated by the Eleventh Amendment." *Lonetree IV*, 97 F.3d at 1035-1036. The unstable and legally unsavory result from holding such decisions as *Lonetree IV* void should not obtain here.

## CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April 8, 1998

(3)

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No. 97-1378

# In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF SOUTH DAKOTA; WILLIAM J. JANKLOW, as Governor; JOYCE HAZELTINE, as Secretary of State; and MARK BARNETT, as Attorney General,

*Petitioners*

v.

SDDS, INC.,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of South Dakota**

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Respondent's brief in opposition confirms the extraordinary nature of the proceedings in this case. SDDS does not deny that the *Lonetree IV* litigation was brought in federal court for the *sole* purpose of imposing retroactive monetary liability on the State of South Dakota. Respondent also does not take issue with our observation that the questions presented in the petition about the propriety of giving force to the *Lonetree IV* decision raise important and recurring issues of federal law. And SDDS appears to recognize that the proceedings here offer plaintiffs across the Nation a blueprint for circumventing the Eleventh Amendment by converting actions brought under *Ex parte Young*, 209 U.S. 123 (1908), into vehicles for obtaining money damages from States. Because the arguments that respondent does offer lack merit — and because the holding below cannot be reconciled with this Court's decisions — further review accordingly is warranted.

**A. The Court Has Jurisdiction To Hear This Case**

While SDDS initially contends (at Opp. 9-12) that the Court lacks jurisdiction to consider this case, the finality rule upon which respondent relies has "not been administered in such a mechanical fashion." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477 (1975). To the contrary, several considerations make plain that this case falls squarely within the category of proceedings in which "[t]he fact that separate and unresolved issues are pending in the [state] courts and are subject to 'further proceedings' therein * * * does not render the judgment of the [state] Supreme Court on the issue here considered * * * nonfinal or unappealable within the meaning of 28 U.S.C. § 1257." *Hudson Distributors* v. *Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964).

To begin with, the fourth category of judgments identified as final in *Cox* includes those

> where [1] the federal issue has been finally decided in the state courts [2] with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the issue by this Court, and [3] where reversal of the

> state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. [4] In these circumstances, if a refusal immediately to review a state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. at 482-483.

All of these factors are present here. (1) The court below finally decided the dispositive federal questions: whether the Eighth Circuit's decision in *Lonetree IV* was void for lack of jurisdiction, and whether that void federal judgment may bind a state court in a suit for money damages against a State. (2) The State could prevail on nonfederal grounds on remand, precluding review of the federal issue.[1] (3) Reversal of the decision below would effectively dispose of the litigation since, as we have explained (at Pet. 6-7), the South Dakota Supreme Court indicated that it was inclined to rule for the State on the takings claim were it free to do so. (4) Delaying review would "present a real danger of some irreparable injury to federal policies or constitutional concerns" embodied in the Eleventh Amendment (R. Stern, E. Gressman, S. Shapiro, & K. Geller, SUPREME COURT PRACTICE 99 (7th ed. 1993)) by requiring the State to stand trial at the behest of a federal court. See generally *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 179-180 (1988); *Cox*, 420 U.S. at 485-486; *Local No. 48, Construction & General Laborers' Union* v. *Curry*, 341 U.S. 542, 550 (1963).

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[1] Among other things, on remand the State will argue that it should prevail on state-law grounds of judicial estoppel, failure to provide statutory notice, and failure to mitigate damages.

In addition, entirely apart from the technical elements of *Cox*'s fourth category, the nature of the Eleventh Amendment principle at stake here requires immediate review. In response to the Eighth Circuit's judgment, the court below subjected the State to burdensome remand proceedings that otherwise would not have taken place. That injury to the State's "dignitary interests" (*Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)) cannot be remedied in the future. The "fundamental constitutional protection" afforded by the Eleventh Amendment is designed both to insure that "States not be unduly burdened by litigation" and to "'prevent the indignity of subjecting a State to the coercive process of judicial tribunals'" (*id.* at 145, 146 (citation omitted)) — and it is a crucial element of the immunity that States may identify not only whether but *where* they may be sued. *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 241 (1985). Delaying review thus would make vindication of the State's constitutional interests impossible. Cf. *Metcalf & Eddy*, 506 U.S. at 146; *Bullington* v. *Missouri*, 451 U.S. 430, 437 n.8 (1981). And that is particularly so because the federal-court injunction may effectively preclude the State from raising federal issues relating to its liability in the future. In such circumstances, immediate review plainly is in order. See generally *North Dakota Pharmacy Board* v. *Snyder's Stores*, 414 U.S. 156, 163-164 (1973).

In arguing to the contrary, SDDS pointedly does *not* deny that the elements of the various *Cox* tests are satisfied here. Instead, it contends only that, under *Cox*, finality is absent whenever additional federal questions may be addressed on remand. Br. in Opp. 11. But the Court in *Cox* did not purport to set down any such hard-and-fast rule. Nor could it have; in at least one of the cases relied upon in *Cox* (420 U.S. at 484 n.11, citing *Hudson Distributors*), a federal issue was prominently featured among those to be considered on remand. See *Hudson Distributors*, 377 U.S. at 388 & n.2

(noting that case had been remanded to address Sherman Act claim).

The other finality holdings cited by SDDS (at Br. in Opp. 10-11) are simply inapposite here. SDDS thus asserts that there is no finality when a petition for certiorari presents the question whether a taking has occurred in circumstances where the case has been remanded for a determination of damages. The cases cited by SDDS, however, explain that finality is absent in such a situation "because 'the federal constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that *integral problem*.'" *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 633 (1980), quoting *Snyder's Drug Stores*, 414 U.S. at 163 (emphasis added).[2] Here, in contrast, the petition raises *no* substantive takings issue at all, instead presenting questions about the binding effect of a federal judgment in a case seeking money damages from a State. In this setting, the issue presented here is "not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963). See *Cox*, 420 U.S. at 484. The federal question offered in the petition thus is in no

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[2] Even in the circumstances of those cases, the Court did not state an absolute rule rejecting finality whenever the petition presents a takings issue and the amount of compensation remains undetermined. See, *e.g.*, *Republic Gas Co.* v. *State of Oklahoma*, 334 U.S. 62, 67 (1948) (emphasis added) (no finality in takings case, "*particularly* when the property will not change hands until after the award of compensation"); R. Stern, E. Gressman, S. Shapiro, & K. Geller, *supra*, at 101 (emphasis added) (judgment that taking occurred, when amount of compensation is not yet set, "is not *usually* considered final, especially where the property will not change hands until after the award of compensation").

sense an "integral" part of the issues that remain to be decided on remand.[3]

SDDS's challenge to the Court's jurisdiction therefore lacks substance. "The critical federal question * * * has * * * already been answered by the State Supreme Court." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 370 n.11 (1988). The legal issue that has been decided — which relates to the binding effect of the federal-court judgment — involves a "separate and independent matter" from the questions to be considered on remand. *Langdeau*, 371 U.S. at 558. And any delay in review will "seriously erode federal policy" (*Goodyear Atomic Corp.*, 486 U.S. at 179) and irreparably damage the State's dignitary interests. The judgment below accordingly is "ripe for review." *Mississippi Power*, 487 U.S. at 370 n.11.

### B. The Court Below Decided The Federal Question Presented Here

SDDS's next contention (at Br. in Opp. 12-14) — that the federal issue was not raised or passed upon below — is wholly insubstantial. In fact, the state supreme court *expressly* decided the question presented here. That court found that the Eighth Circuit "had jurisdiction over th[e] federal constitutional matter presented in *Lonetree IV*." Pet. App. 12a. And the court below explicitly endorsed and quoted the Eleventh Amendment analysis used in *Lonetree IV* in support of the

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[3] *Jefferson* v. *City of Tarrant*, 118 S. Ct. 481 (1997), cited by SDDS at Br. in Opp. 9-10, also is inapposite. Resolution of the federal question would not have disposed of that case; because the petitioners also had state-law claims that would have to be resolved on remand in any event, the case "present[ed] the typical situation in which the state courts have resolved some but not all of the petitioners' claims." 118 S. Ct. at 487. And unlike the South Dakota court's holding here, the interlocutory decision in *Jefferson* did not threaten significant frustration of federal policies.

state court's holding that it was "bound by the recent judgment of the Eighth Circuit." *Ibid.* See *id.* at 12a-13a. In these circumstances, there of course "can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436-437 (1959). See R. Stern, E. Gressman, S. Shapiro, & K. Geller, *supra*, at 131 (citing cases).

While that is enough to dispose of SDDS's argument, it may be added that respondent exhibits a certain gall in faulting the State for failing to submit argument on the significance of *Lonetree IV*. While SDDS blithely chides the State because it "declined even to file a brief or submit oral argument" on the point (Br. in Opp. 6; see *id.* at 12-13), the State made clear that it took that course — and that it refrained from presenting its Eleventh Amendment arguments in a rehearing petition — because it believed that it was constrained by the federal-court injunction to withhold any argument bearing on its takings liability. See Appellees' Motion to Remove Proceeding From Oral Argument Calendar (Feb. 26, 1997); Pet. for Rehearing 1. And far from suggesting that the State could make supplemental argument on the point, SDDS threatened the State with contempt sanctions if it failed to *withdraw* the brief that it had filed in the South Dakota Supreme Court *prior* to the decision in *Lonetree IV*. See Letter to Attorney General Mark W. Barnett from Edward T. Lyons, Jr. (May 22, 1997) (reprinted in the addendum to this brief). The State therefore can hardly be thought to have surrendered its rights by failing to argue the issue below.

### C. The Eighth Circuit's Decision In *Lonetree IV* Was Void For Lack Of Jurisdiction

It is perhaps understandable that SDDS is so imaginative in its procedural arguments against review, because its defense of the judgment below is entirely unavailing. In arguing that the federal judgment found binding by the South Dakota court was not void, SDDS's principal contention is that the State

waived its Eleventh Amendment immunity. This assertion, however, rests on a remarkable misreading of the record. SDDS premises its waiver argument on ¶ 24 of the state defendants' answer to SDDS's federal complaint. See Br. in Opp. 4, 15-16. But that paragraph states:

> As a[n] * * * affirmative defense, Defendants assert that Plaintiff's claim fails on the doctrine of sovereign immunity and, to the extent it can be construed to involve a claim for monetary relief, is barred by the Eleventh Amendment to the United States Constitution.

Far from being a case in which "the State of South Dakota *consented*" to suit (Br. in Opp. 14 (emphasis in original)), the State thus *asserted* its immunity to the fullest degree possible.[4]

Nor does SDDS obtain any additional mileage from its observation (at Br. in Opp. 4-5, 16) that the state defendants participated in the *Lonetree III* litigation challenging the constitutionality of the Referendum. The State has never denied that *Lonetree III*, as a suit seeking prospective relief against an ongoing (asserted) violation of federal law, could proceed against state officials under the doctrine of *Ex Parte Young*. But that cannot serve to justify the *Lonetree IV* proceeding, which was commenced long after any violation of federal law had ended, which was directed against the State rather than state officials, which was brought for the sole purpose of obtaining monetary relief against the State — and

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[4] In addition, SDDS is wrong in contending (at Br. in Opp. 15-16) that a State's appearance to defend a suit on the merits bars the State from asserting its Eleventh Amendment immunity at a later point in the litigation. In fact, it has long been settled that the Amendment may be raised at any time — and, indeed, that immunity may be asserted for the first time in this Court. See. *e.g.*, *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 467 (1945).

in which the State *expressly* asserted its Eleventh Amendment immunity. See *Lonetree IV*, 97 F.3d at 1032.

SDDS's related argument (at Br. in Opp. 17-19) that the *Lonetree IV* injunction is permissible "ancillary" relief is flawed for similar reasons. The Eleventh Amendment decisions cited by SDDS in support of this proposition all involved circumstances in which the challenged relief was necessary to terminate an *ongoing* violation of federal law. But that manifestly is not the case here. The decision in *Lonetree III* — which is hardly rendered "precatory" (Br. in Opp. 19) under the State's theory — invalidated the Referendum and terminated any violation of federal law. The *Lonetree IV* litigation concededly was intended simply to obtain monetary relief from the State, and no decision of this Court justifies such a proceeding under the Eleventh Amendment.

### D. A State Court May Not Be Bound By A Federal-Court Decision Issued In Violation Of The Eleventh Amendment

SDDS also advances no substantial reason to deny review when it contends that the court below was bound by the Eighth Circuit's judgment. Respondent does not even attempt to defend the state court's holding that it was bound by the Eighth Circuit's injunction, maintaining instead that the decision below was based exclusively on res judicata and collateral estoppel principles. Br. In Opp. 21. Yet SDDS cannot show that application of those principles in this case is reconcilable with this Court's decisions — and it entirely fails to establish that the Eleventh Amendment ever permits use of a federal court judgment to bind a State in an action for money damages.

To the contrary, SDDS acknowledges (at Br. in Opp. 20) this Court's recognition that "the general rule of finality of jurisdictional determinations is not without exceptions" and may be overcome by "[d]octrines of federal pre-emption or

sovereign immunity." *Durfee* v. *Duke*, 375 U.S. 106, 114 (1963), citing *United States* v. *United States Fidelity & Guar. Co*, 309 U.S. 506 (1940), *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940), and RESTATEMENT, CONFLICT OF LAWS § 451(2) (Supp. 1948). And SDDS's attempt to distinguish *United States Fidelity & Guar.* and *Kalb* have no merit at all. Respondent's principal argument (at Br. in Opp. 20) appears to be that the state defendants' failure to file a petition in this Court challenging the *Lonetree IV* decision makes the doctrine of *United States Fidelity & Guar.* and *Kalb* inapplicable here. But that plainly is not so: the decisions that were denied res judicata and collateral estoppel effect in those cases *also* had not been challenged on direct appeal. See *United States Fidelity & Guar.*, 309 U.S. at 510; *Kalb*, 308 U.S. at 435-436 (defendant did not seek to stay or otherwise challenge judgment of foreclosure that later was collaterally attacked).

SDDS's remaining contentions are equally insubstantial. It attempts (at Br. in Opp. 20-21) to distinguish *United States Fidelity & Guar.* on the ground that (in asserted contrast to this case) the sovereign immunity claim there had not been raised and litigated in the court in which judgment first was entered. We explained in the petition (at 20 n.11), however, that the immunity issue may in fact have been litigated in the first forum in *United States Fidelity & Guar.*, and that this Court evidently did not regard the matter as significant; SDDS makes no response to that point. In addition, as we also noted in the petition (at 19), both the RESTATEMENT (SECOND) OF CONFLICT OF LAWS (hereinafter "RESTATEMENT") (at § 96, cmt. a) and leading commentators (see 18 Moore's Federal Practice § 130.04[3] (3d ed. 1997)) read *United States Fidelity & Guar.* as an exception to the usual rule that gives res judicata effect to a "*finding by a court* that it has * * * jurisdiction over the defendant." RESTATEMENT § 96 cmt. a (emphasis added). Again, SDDS makes no response. The rule of *United States Fidelity & Guar.* thus generally is understood to apply in cases where the issue of jurisdiction

has been litigated; at worst, the issue whether sovereign immunity strips a judgment of collateral effect in such circumstances is an open question that should be settled by this Court. Cf. *Durfee*, 375 U.S. at 114 & n.12.

SDDS's discussion of *Kalb* (at Br. in Opp. 21), meanwhile, is simply mystifying. Respondent reports that *Kalb* "merely held that the state court proceedings giving rise to the appeals could be collaterally attacked in the federal bankruptcy court." In fact, the collateral attack in *Kalb* occurred in state court. But more fundamentally, SDDS evidently acknowledges the holding in *Kalb* that a determination of jurisdiction need *not* be given res judicata or collateral estoppel effect. The Court thus explained in *Kalb* that the lack of jurisdiction in the court issuing the first judgment rendered its decisions "nullities subject to collateral attack," and that this was so "whether the issue of jurisdiction was actually contested in the [first] Court, or whether it could have been contested." 308 U.S. at 439, 444 (footnote omitted). As we explained in the petition (at 20), *Kalb* thus stands for the proposition that, while a court's determination of its subject matter ordinarily is not subject to collateral challenge, a state court may not apply that "rule of res judicata when to do so would conflict with an important federal policy." RESTATEMENT § 97, cmt. c. We also noted that the Eleventh Amendment states just such a federal policy. Again, SDDS makes no response to these points. Review of the decision below therefore plainly is in order.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1998

**ADDENDUM**

May 22, 1997

**VIA FACSIMILE (605) 773-4106**
**AND U.S. MAIL**
Hon. Mark W. Barnett
Attorney General
State of South Dakota
500 East Capitol
Pierre, SD 57501-3215

Re: SDDS, Inc., v. State of South Dakota, et. al.
South Dakota Supreme Court, No. 19555

Dear Attorney General Barnett:

The State Defendants' motion requesting the Supreme Court to remove this case from the oral argument calendar explicitly acknowledged that the Eighth Circuit's decision in In re SDDS, Inc., 97 F.3d 1030 (8th Cir. 1996), together with the federal court injunction entered thereon, effectively "constrain" the State Defendants from presenting any "meaningful" oral argument in the case. This is understandable, of course, because the precise arguments that the State Defendants had previously used in this case to resist liability for the consequences of the unconstitutional referendum are now foreclosed by the decision and injunction entered in the federal courts.

But simply refraining from reasserting these arguments orally is not enough. In order to comply with the injunction, SDDS believes that it was also incumbent on the State Defendants to withdraw the brief in which these same arguments remain on display in this case. SDDS expressly questioned why this had not been done — and whether the failure to do so would violate the injunction — when it responded in writing to the State Defendants' motion to dispense with oral argument. This cautionary indication has been ignored. The State Defendants

have instead apparently determined to take their chances that in possible further proceedings in federal court, their token compliance of foregoing oral argument will be deemed sufficient to avoid any imposition of sanctions. SDDS disagrees and respectfully suggests that the State Defendants are proceeding at considerable peril.

In the event that its prior admonition was not understood, SDDS wants at this time to make it unmistakably clear to the State Defendants that, as SDDS understands the mandate and injunction of the federal courts, the brief of the State Defendants should be withdrawn immediately.

Very truly yours,

Edward T. Lyons, Jr.
Attorney for SDDS, Inc.

cc: SDDS, Inc.